Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STUART HAYNSWORTH, et. al.,
Petitioners,

v.

LLOYD'S OF LONDON, et. al.,
Respondents.

On Petition For A Writ Of Certiorari to the United States Court Of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can defendants use contractual clauses to waive plaintiffs' substantive rights under the Securities Exchange Act of 1934, the Texas Securities Act and the Texas Deceptive Trade Practices-Consumer Protection Act, despite express legislative mandates that such substantive rights cannot be waived and where enforcement violates the public policy of the forum state?

2. Does the Fifth Circuit's interpretation of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), conflict with the holdings in *Moseley v. Electronic & Missile Facilities,* 374 U.S. 167 (1963), and *C.B.S. Employees Federal Credit Union v. Donaldson*, 912 F.2d 1563 (6th Cir. 1990)?

LIST OF PARTIES

The following parties were defendants in the district court and are Respondents before this Court:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STUART HAYNSWORTH, ET AL., *Petitioners,*

v.

LLOYD'S OF LONDON, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Stuart Haynsworth, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit in *Haynsworth v. The Corporation,* 121 F.3d 956 (5th Cir. 1997), is in the Appendix at 1a-27a. The Fifth Circuit's Order denying Petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc* in *Haynsworth v. The Corporation* is in the Appendix at 126a-127a. The Opinion of the United States District Court for the Southern District of Texas, Houston Division in *Leslie v. Lloyd's of London,* 1995 WL 661090 (S.D. Tex. 1995), is in the Appendix at 28a-92a. Separate Findings of Fact and Conclusions of Law issued by the district court in *Leslie,* 1994 WL 873350 (S.D. Tex. 1994), are in the Appendix at 93a-106a. The Opinion of the United States District Court for the Southern District of Texas, Houston Division in *Haynsworth v. Lloyd's of London,* 933 F. Supp. 1315 (S.D. Tex. 1997), is in the Appendix at 107a-125a.

JURISDICTION

This petition for writ of certiorari is brought pursuant to 28 U.S.C. § 1254(a). The appeal is from an Opinion issued by the United States Court of Appeals for the Fifth Circuit on August 29, 1997. A timely filed Petition for Rehearing was denied by the Court of Appeals on October 13, 1997.

STATUTORY PROVISIONS

Section 29(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc, is titled "validity of contracts" and provides:

> Waiver provisions. Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

Article 581-33L of the Texas Securities Act, Tex. Rev. Civ. Stat. Ann. art. 581 *et. seq.* (Vernon Supp. 1997), provides:

> Waivers Void. A condition, stipulation, or provision binding a buyer or seller of a security to waive compliance with a provision of this Act or a rule or order or requirement here under is void.

Section 17.42(a) of the Texas Deceptive Trade Practices-Consumer Protection Act, Texas Business and Commerce Code Section 17.41, *et. seq.* (Vernon Supp. 1997) (the "DTPA") provides: "Any waiver by a consumer of the provision of this subchapter is *contrary to public policy and is unenforceable and void.*" (Emphasis added.)

STATEMENT OF THE CASE

A. Procedural History

This case consolidates two appeals. In the first, plaintiff Charles Robert Leslie filed suit against Lloyd's in July 1990 alleging violations of the Securities Exchange Act, Rule 10b-5, and the DTPA. Federal jurisdiction was based on both federal question and diversity of citizenship. Lloyd's moved to dismiss based upon a forum selection/choice of law clause ("FS/COL clause") executed after the events giving rise to plaintiffs' then unknown causes of action, and ten years after the parties' relationship began. After conducting an evidentiary hearing, the district court in *Leslie*, applying *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), held the FS/COL clause to be unenforceable on four independent grounds: (1) it waived substantive Securities Exchange Act rights in violation of federal public policy and the antiwaiver provision of the Act, (2) it waived substantive DTPA rights in violation of Texas public policy and the antiwaiver provision of the DTPA, (3) it was procured by fraud and (4) it was the product of overreaching. App. 82a-85a. Ignoring the factual findings of the district court, the Court of Appeals reversed, ordering that the case be dismissed.[1/] In the second case, *Haynsworth v. Lloyd's of London*, plaintiffs sued Lloyd's for violations of the DTPA and the Texas Securities Act. Federal jurisdiction was based on diversity of citizenship. Without holding an evidentiary hearing, the district court dismissed based upon the FS/COL clause. The Fifth Circuit affirmed the dismissal.

This Court should grant certiorari and vacate the Fifth Circuit's opinion and judgment. This case presents questions of exceptional importance. The Fifth Circuit's holding is directly contrary to specific mandates of the United States Congress and the

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[1] References to the *Leslie* court are to the *Leslie* district court decision.

Texas legislature that compliance with the Securities Exchange Act and the Texas securities and consumer protection acts cannot be waived.

The Fifth Circuit's holding creates an implied waiver of the substantive protections of the securities laws and the DTPA whenever foreign products or securities are offered for sale in the United States. If allowed to stand, it will grant foreign entities that solicit investors and consumers in the United States immunity from United States securities and consumer protection laws, a result contrary to Congressional intent.

The Fifth Circuit's opinion directly conflicts with the Ninth Circuit's opinion in *Richards v. Lloyd's of London,* 107 F.3d 1422 (9th Cir. 1997) (*en banc* review pending). In *Richards,* the Ninth Circuit voided the same FS/COL clauses because they "operate to effect such waivers. Accordingly, under the precise terms of [t]he Securities Exchange Act], the [FS/COL clauses] are void." *Id.* at 1426.

Finally, the Fifth Circuit's Opinion is contrary to this Court's reasoning as consistently expressed in *Shearson/American Exp., Inc. v. McMahon,* 482 U.S. 220 (1987), *Scherk v. Alberto Culver Co.,* 417 U.S. 506 (1974); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,* 115 S. Ct. 2322 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614(1985); and *The Bremen v. Zapata Off-Shore Company*, 407 U.S. 1 (1972).

B. Facts

This case arose because Lloyd's came to Texas and misled American investors in order to induce them to agree to a FS/COL clause that, if enforced, will waive the unwaivable substantive protections of the United States securities laws, the Texas Securities Act and the Texas DTPA. Lloyd's did this as part of a scheme to force defrauded U.S. investors to litigate their as yet undiscovered claims in England, where Lloyd's had recently secured the passage of private legislation specifically designed to grant Lloyd's immunity from those claims. The effect was for plaintiffs to waive existing claims that were known to Lloyd's but not to plaintiffs.

Petitioners are all Texas residents. Lloyd's agents came to Texas to seek investment capital for Lloyd's. App. 64a-67a. As a result of Lloyd's solicitations, each of the Petitioners purchased securities and consumer services from Lloyd's in Texas beginning as early as 1976. These sales were accomplished through misrepresentations and fraudulent omissions made to the Petitioners in Texas, in person and by telephone and mail. App. 39a, 64a-67a, 95a-101a.

While Lloyd's was soliciting Petitioners to invest, Lloyd's had knowledge of staggering, undisclosed asbestos and pollution losses and the potential for a market collapse. App. 39a, 96a-101a. Lloyd's did not disclose this information to the Petitioners. App. 39a, 81a, 39a n .23, 100a-101a. Lloyd's then placed each petitioner into syndicates that contained high risk exposures, such as asbestosis and pollution risks. App. 96a-97a. In some cases Lloyd's insiders, aware of the problems, transferred these liabilities from syndicates in which they invested into the ones carried by the plaintiff underwriters. R. 3322-24.

Petitioners' original contracts with Lloyd's did not contain a FS/COL clause. App. 101a. The FS/COL clause was not implemented by Lloyd's until ten years after some Petitioners joined Lloyds, and after the events that form the basis of most of

Petitioners' causes of action. App. 96a-97a. Lloyd's decided to impose the FS/COL clause for the first time in its 300-year history, against a backdrop of threatened litigation by a few American investors. App. 70a-71a, 79a, 102a. The FS/COL clause was contained in a new 1986 General Undertaking that Lloyd's sent to Petitioners in the United States for execution. App. 65a. The *Leslie* court found that the new General Undertaking contained nothing more than the FS/COL clause. App. 71a n. 53.

The clause was only implemented after Lloyd's convinced England's Parliament to pass the Lloyd's Act of 1982, a private act which, unknown to the Names, granted Lloyd's broad immunity from liability for its misrepresentations to the Names. App. 39a-40a, 79a. The FS/COL clause also came on the coattails of an act that exempted Lloyd's recruiting efforts from England's statute regulating disclosures by financial intermediaries. R. 1819. Thereafter, Lloyd's sent newsletters to Petitioners, describing the content of the Lloyd's Act of 1982, stressing that it provided "greater" protection to the Names, but made no mention at all of Lloyd's new immunity from liability. App. 81a.[2] Instead, Lloyd's described the purpose and content of the 1986 General Undertaking and other agreements to Petitioners as containing "few variations of substance" from the prior contracts. Lloyd's falsely represented that the Lloyd's Act of 1982 mandated the new General Undertaking. App. 40a n.24, 102a.

Just months before the document was sent to Petitioners, Lloyd's Chairman assured investors that recent reforms reduced the likelihood of scandals in the market. App. 101a. He stated that the "Council of Lloyd's has now evolved a regulatory system which is both appropriate to the modern day world and is also one in which the current members of Lloyd's and those seeking membership can

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[2] As a private act, the Lloyd's Act of 1982 does not have the same level of distribution among lawyers and the public as would a public act of Parliament. R. 1814-15, 1919.

fully place their trust." App. 101a; emphasis added. The new General Undertaking was supposedly part of this new regulatory scheme. Lloyd's touted that "very full disclosure" was to protect the Petitioners at the very time that it was not disclosing underwriting market risks that could bankrupt the industry. App. 81a, 101a.

By 1986, most Petitioners began to experience minor losses. App. 41a. However, Lloyd's either did not disclose or misrepresented the reason for the losses, and Petitioners were not aware of the disastrous implications of their predicament. App. 42a. Lloyd's advised Petitioners that the best way to recoup losses was to "trade through" by continuing to underwrite. In order to continue underwriting, however, Lloyd's required Petitioners to sign the new General Undertaking purporting to require all claims against Lloyd's to be brought in England under English law. App. 101a. Petitioners feared that Lloyd's would call their letters of credit if they did not execute the revised agreements. App. 41a, 101a.

The parties agree that if this case is sent to England, then English courts will apply English law, including the Lloyd's acts passed specifically for Lloyd's, and will refuse to apply either the United States securities laws or the DTPA. App.76a-77a, n.56. Accordingly, enforcement of the FS/COL clause will cause a waiver of (1) DTPA and securities law claims that Petitioners had against Lloyd's when they signed the FS/COL clause that were unknown to them and fraudulently concealed from them, and (2) claims unknown to them and fraudulently concealed from them under these acts based on Lloyd's subsequent conduct. App. 71a, 83a-84a. The *Leslie* court found that "this effect on Names' substantive rights was [not] inadvertent or accidental." App. 80a.

ARGUMENT

I. Can Defendants Use Contractual Clauses to Waive Plaintiffs' Substantive Rights Under the Securities Exchange Act of 1934, the Texas Securities Act and the Texas Deceptive Trade Practices-Consumer Protection Act, Despite Express Legislative Mandates that Such Substantive Rights Cannot be Waived and Where Enforcement Violates the Public Policy of the Forum State?

A. The Fifth Circuit refused to apply the antiwaiver mandates by Congress and the Texas legislature.

The Fifth Circuit opinion conflicts with the mandate of Congress in Section 29(a) of the Securities Exchange Act , 15 U.S.C. § 78cc(a) ("any . . . stipulation . . . binding any person to waive compliance with any provision of this chapter . . . is void"), and the mandate of the Texas legislature in DTPA Section 17.42(a) ("any waiver by a consumer of the provisions of [the DTPA] is contrary to public policy and is unenforceable and void"), and the Texas Securities Act article 581-33L ("a . . . stipulation, or provision binding a buyer or seller of a security to waive compliance with a provision of this Act . . . is void.").

The Court has permitted waiver of procedural rights but not of substantive rights. The Fifth Circuit has erased this distinction. Interpreting section 29(a) of the Securities Exchange Act in *McMahon,* this Court stated:

> By its terms, § 29(a) . . . prohibits waiver of the substantive obligations imposed by the Exchange Act. . . . [and] if a stipulation waives compliance with a statutory duty, it is void under § 29(a), whether voluntary or not. Thus, a customer cannot negotiate a . . . waiver of compliance with the requirements of the Exchange Act, even if the customer knowingly and voluntarily agreed to the bargain. Section

> 29(a) . . . [voids any] agreement [that] "weaken[s] their ability to recover under the [Exchange] Act."

McMahon, 482 U.S. at 228, 230. *See also, Vimar,* 115 S. Ct. at 2330, *citing Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. at 637 n.19 ("were we persuaded that 'the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy.'")

The Texas Securities Act is virtually identical to the federal act, and the same analysis applies to the antiwaiver provisions of the Texas statutes, which the Fifth Circuit failed to consider despite this Court's instruction in *The Bremen.* 407 U.S. at 15 (a forum clause "should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision"). The Texas legislature did not leave the courts discretion in determining Texas public policy with respect to the DTPA: "any waiver by a consumer of the provisions of [the DTPA] is contrary to public policy and is unenforceable and void." Section 17.42(a).[3]

Texas courts have consistently upheld the legislature's edict. *See e.g., G. R. Goins Constr. v. S. B. McLaughlin,* 930 S.W.2d 124, 127 (Tex. App. — Tyler 1996) (the "anti-waiver provision of the DTPA applies to both waiver occurring during a transaction and post-transaction waiver by conduct"); *Poe v. Hutchins,* 737 S.W.2d 574, 580 (Tex. App. — Dallas 1987, writ ref'd n.r.e.) (section 17.42 applies to

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[3] The DTPA is not "a codification of common law," but a statutory creation "to provide consumers with a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit." *Bank One, Texas, N.A. v. Taylor*, 970 F.2d 16, 28 (5th Cir. 1992) (emphasis added). See also *Eagle Properties Ltd. v. Scharbauer*, 807 S.W.2d 714, 724 (Tex. 1990).

post-transactional waivers based on contract or the consumer's subsequent conduct: "if the Texas legislature wanted to draft a narrow antiwaiver provision, it knew how to do so"); *Hycel, Inc. v. Wittstruck,* 690 S.W.2d 914, 922 (Tex. App. — Waco 1985, writ dism'd) (section 17.42 "indicates the legislature's disapproval of efforts or ruses designed to avoid liability under the DTPA" and any other result would "emasculate the DTPA and serve to encourage deceptive trade practices.").

B. The Securities Exchange Act and the Texas statutes apply.

Given the specific Congressional antiwaiver prohibition and the language of *McMahon,* this case should have turned on two issues: (1) whether the Securities Exchange Act and the Texas statutes apply, and, if so, (2) whether enforcement of the FS/COL clause would waive substantive obligations imposed on Lloyd's those statutes. The *Leslie* court answered both questions affirmatively. The Ninth Circuit in *Richards* assumed an affirmative answer to the first, and answered yes to the second.

The *Leslie* court found, based on the evidence, that the participations the Petitioners purchased in Lloyd's were securities. App. 53a-56a. The district court then concluded that Leslie had stated a cause of action under the Securities Exchange Act and Rule 10b-5. App. 57a. *Lloyd's did not challenge these findings on appeal.*

There is no dispute that enforcement of the FS/COL clause will waive the Petitioners' substantive Exchange Act rights. App. 176a-77a. *Richards,* 107 F. 3d at 1426, 1430 ("The [FS/COL clauses] operate to effect such waivers . . . Major gaps exist in the English substantive law of securities fraud. The available English remedies are not adequate substitutes for the firm shields and finely honed swords provided by American securities law.")

Similarly, the *Leslie* court found that the Petitioners stated causes of action pursuant to the DTPA. App. 52a. The *Leslie* court

found that "virtually all of the alleged deceptive trade practices took place in Texas." App. 70a. The district court further found that, if the case were dismissed to England, the forum selection clause, enforced in tandem with the choice of law clause would operate as a waiver of Leslie's DTPA rights. App. 85a. The district court correctly found that, under the circumstances, the forum selection clause is unenforceable because it violates Texas public policy. App. 85a.

C. The Fifth Circuit erred by determining that an admittedly inequivalent English remedy was sufficient to protect American investors.

The Fifth Circuit held that because English law generally provided remedies for fraudulent conduct, the courts could overrule the legislatures' antiwaiver mandates. App. 23a-24a. In doing so, the Fifth Circuit wrongly rejected the warnings of the *Richards* and *Leslie* courts that judicial policy cannot be elevated over legislative policy. *Richards,* 107 F.3d at 1429 ("The fundamental issue [is] . . . whether the courts or Congress determines our national policy after Congress has spoken"); App. 82a-85a ("public policy against waivers of securities law remedies is not satisfied merely by the availability of some remotely similar common law or statutory misrepresentation remedy.")[4] *See, also, Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 406 (1967); *Stewart Organization v. Ricoh Corp.,* 487 U.S. 22, 28 (1988), (*The Bremen* policy analysis under federal common law is not controlling when Congress has expressed its will in a statute that addresses the "immediate issue before the Court.")

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[4] In *Richards*, the SEC's *amicus curiae* brief states that requiring investors to litigate in England under English law, "not only weakens the investors' ability to recover, but in fact precludes any possibility of recovery under federal securities laws." Like *Leslie*, the Commission noted that the combination FS/COL clause in the Lloyd's contract distinguishes it from the forum selection clauses upheld in *The Bremen*; *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *Scherk*; and *Mitsubishi*. In addition, the Commission, like *Leslie*, rejected the view that English law affords satisfactory relief.

Other Appeals Courts have enforced the Lloyd's FS/COL clause by applying an improper balancing test and based upon little more than an assumption that English remedies were sufficient, even if substantive federal securities acts rights are waived. *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996); *Shell v. R. W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir. 1992). Two of these courts enforced the FS/COL clause despite serious concerns over the waiver issue. *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1364 (2d Cir. 1993) ("We are concerned . . . that the . . . contract clauses may operate `in tandem' as a prospective waiver of the statutory remedies for securities violations"); *Bonny v. Society of Lloyd's*, 3 F.3d 156, 160 (7th Cir. 1993) ("we have serious concerns that Lloyd's clauses operate as a prospective waiver of statutory remedies for securities violations"). These cases are distinguishable from this case, and have been academically criticized. *See, Note, No Way Out: An Argument Against Permitting Parties to Opt Out of U.S. Securities Law in International Transactions*, 97 Colum. L. Rev. 57 (1997).

D. The Fifth Circuit's decision contravenes Supreme Court precedent.

The Fifth Circuit erroneously determined that the antiwaiver provisions were irrelevant and inapplicable. The Court of Appeals based its decision not to apply the statutory antiwaiver provisions on a misreading of *Scherk v. Alberto Culver Co.*, 417 U.S. 506 (1974).[5] The Fifth Circuit reads *Scherk* to create an implied waiver of substantive rights under the Securities Exchange Act in "international" transactions.

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[5] The Fifth Circuit interprets *Scherk* to excuse it from determining whether Petitioners purchased securities from Lloyd's. The Court in *Scherk* did not determine whether the transaction was a security because the issue was not raised on appeal, 417 U.S. at 514 n 8, 518 n12. Moreover, the *Scherk* Court determined that enforcement of the arbitration clause at issue would only affect procedural rather than substantive rights. Accordingly, a determination of whether the Act applied was unnecessary because no substantive rights would be disturbed in any event. That is not true here.

procedural and substantive rights under the Securities Exchange Act] . . . seems eminently sensible to us"). But, as explained in the 1987 decision in *McMahon*, this Court did establish a procedural versus substantive distinction in *Scherk:*

> The decision in *Scherk* thus turned on the Court's judgment that under the circumstances of that case, arbitration was an adequate substitute for adjudication *as a means of enforcing the parties' statutory rights. Scherk* supports our understanding that *Wilko* must be read as barring waiver of a judicial forum only where arbitration is inadequate *to protect the substantive rights at issue.*

McMahon, 482 U.S. at 229 (emphasis added). The Fifth Circuit did not explain or even cite *McMahon.* It wryly pointed out that it was bound to follow *Scherk*, even if it believed that "later decisions have undermined its rationale." App. 25a, citing *Rodriquiez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

This Court held in *Scherk* that arbitration is a suitable "means of enforcing Exchange Act rights." *Id.* at 232. See also, *Richards*, 107 F.3d at 1427 ("arbitration changes procedure but . . . the arbitrators will apply the substantive securities law of the United States where that law is applicable.") Accordingly, this Court enforced a foreign arbitration clause in *Scherk,* because — and only because — the substantive statutory rights of the plaintiff under the Securities Exchange Act were protected.[6] Pursuant to *McMahon*, the FS/COL clause in this case is

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[6] The Fifth Circuit interprets *Scherk* to hold that the *The Bremen* preempts enforcement of the Securities Exchange Act antiwaiver provisions in the international context. The Fifth Circuit's evaluation is misplaced. This Court only applied *The Bremen* common law test in *Scherk* after it determined that the statute permitted procedural, but not substantive, waivers. *See, Richards,* 107 F.3d at 1429 ("The Bremen announced a reasonableness test to evaluate choice-of-forum clauses when Congress has not directly spoken to the issue. The "unreasonableness" test does not apply here where Congress specifically enacted antiwaiver provisions in the Securities Acts.").

void, whether entered into voluntarily or involuntarily, because, if enforced, it indisputably waives and releases Lloyd's compliance with the provisions of the Securities Exchange Act and Texas statutes. *See also, Richards,* 107 F.3d at 1428 (the FS/COL clause "require[s] the waiver of substantive provisions of the 1933 and 1934 Acts and [is] consequently void.") The Fifth Circuit's failure to follow *McMahon* and to properly follow *Scherk* is error and must be reversed in order to avoid the judicial creation of a gaping hole in the regulatory framework for securities transactions.[7]

The Fifth Circuit's decision also cannot be reconciled with the Supreme Court's continued pronounced intent to protect unwaivable substantive statutory rights in other cases. *See e.g. Vimar,* 115 S. Ct. 2322; *Mitsubishi*, 473 U.S. 614.

In *Vimar*, the Court enforced an arbitration agreement after determining that enforcement would only affect procedural, as opposed to substantive, rights under the Carriage of Goods by Sea Act, 46 U.S.C. app. § 1300, *et. seq.* ("COGSA"). 115 S. Ct. 2322, 2327 ("The statute thus addresses the lessening of the specific liability imposed by the Act, without addressing the separate question of the means and costs of enforcing that liability.") The Court noted that COGSA nullifies contractual provisions lessening liability: "[t]he relevant question . . . is whether the substantive law to be applied [in the foreign forum] will reduce the carrier's obligations to the cargo owner *below what COGSA guarantees.*" *Id.* at 2329. The Court enforced the

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[7] The Fifth Circuit may have embraced Lloyd's claims that *McMahon* applied only to domestic transactions. This distinction cannot be justified based on the Court's discussion in *McMahon.* The Eleventh Circuit recently recognized that "[i]n *McMahon,* the Supreme Court . . . discarded the distinction between domestic and international transactions . . . ." *Kotam Elecs., Inc. v. JBL Consumer Prods., Inc.*, 93 F.3d 724, 727 & n.5 (11th Cir. 1996) (*en banc*), *cert. denied*, 117 S. Ct. 946 (1997).

would be preserved in the foreign forum, noting that the district court has retained jurisdiction to review the foreign arbitral result to ensure compliance with COGSA's protective provisions. *Id.* at 2329-40.

Similarly, in *Mitsubishi,* the Court upheld an arbitration agreement because enforcement would not affect the parties substantive Sherman Act rights. "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute, it only submits to their resolution in an arbitral, rather than a judicial, forum . . . [a]nd so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." 473 U.S. at 628, 637.

The Fifth Circuit dismissed the Supreme Court's warning in *Mitsubishi* as dicta (or as being limited to antitrust claims), that tandem choice-of-forum and choice-of-law clauses waiving statutory rights would be condemned. 473 U.S. at 637 n.19. Yet, this Court specifically applied this admonition to the Securities Exchange Act in *McMahon.* There, as in *Mitsubishi*, the Court found that "the streamlined procedures of arbitration do not entail any consequential restriction on substantive rights," noting that court review of the arbitration award "is sufficient to ensure that arbitrators comply with the requirements of the statute." 482 U.S. at 232. The Court thus concluded in *McMahon,* that, as in *Scherk* and *Mitsubishi*, the parties unwaivable substantive statutory rights would be protected by subsequent judicial scrutiny of an arbitration award.

If enforced, the FS/COL clause in this case will do precisely what the Court said it would condemn in *Vimar* and *Mitsubishi.* English courts will not apply the United States securities laws and will instead enforce the Lloyd's acts that were passed specifically to limit Lloyd's liability. Enforcement of the FS/COL clause will, therefore, reduce Lloyd's obligations to a standard below what the federal and state securities laws and DTPA guarantee. Here, unlike *Vimar, McMahon, Mitsubishi* and *Scherk,* the Petitioners are not offered the subsequent judicial review provided to an arbitration award. There is no mechanism to ensure that Petitioners' unwaivable statutory rights

will be upheld. The significance of this distinction was highlighted in *Vimar*. *See,* 115 S. Ct. at 2330 (J. O'Connor, concurring) ("Foreign arbitration clauses of the kind presented here do not divest domestic courts of jurisdiction, unlike true foreign forum selection clauses . . . That difference is an important one - it is, after all, what leads the Court to dismiss much of petitioner's argument as premature.").

E. The Fifth Circuit wrongly concluded that this case involved the type of international transaction considered in *Scherk*.

The Fifth Circuit wrongly held that this case involved the type of "international business transaction" contemplated in *Scherk*. The *undisputed* evidence shows that Lloyd's transaction with Petitioners was predominantly a Texas based consumer and securities transaction, not a wholly foreign or international transaction. App. 65a. The lawsuit is based "upon the actions of Lloyd's and its agents as Lloyd's sought access to investment capital in the United States." App. 67a. Lloyd's recruited the Petitioners in the United States; Lloyd's sold its securities to Petitioners here; Lloyd's made its actionable misrepresentations here; Petitioners signed agreements here; and Petitioners maintained their letters of credit mostly through Texas and United States banks. All of the conduct of Lloyd's and its agents that forms the basis of Petitioners' securities law and DTPA causes of action occurred in Texas, or through the mails or telephone while the Petitioners were in Texas. App. 64a, 69a. In finding that this case involved the sort of "international transaction" contemplated in *Scherk* the Fifth Circuit ignored the district court's finding that the only English contact by Petitioners was a "ritual ceremony" that the court found to be merely a pretense by Lloyd's, intended to deprive investors of the protections of the United States laws. App. 64a. The facts here differ sharply from those of *Scherk*. There a sophisticated United States corporation (1) sought out the seller of a business in Germany, (2) engaged experienced counsel and consultants, and (3) negotiated in several different countries before signing a deal in Austria and closing in Switzerland. 417 U.S. at 517.

This case does not involve the extraterritorial application of the United States securities laws.[8] Lloyd's improperly attempts to extend the international mantle of its insurance underwriting to Lloyd's domestic capital *solicitation* activities in Texas. App. 65a. "Lloyd's was directly involved in the distribution of securities throughout the United States, and by entering this market have elected to subject themselves to the . . . United States securities laws." App. 65a. "Virtually all the alleged deceptive trade practices took place in Texas." App. 70a.

The involvement of Lloyd's in the United States and with citizens of this country was not a sporadic or isolated incident. Over 2,000 Americans became members of Lloyd's syndicates. App. 66a. Over the years, Americans supplied hundreds of millions, if not billions, of dollars of capital to Lloyd's. App. 68a, n.52. Public policy invalidates the FS/COL clauses because enforcement "would thereby significantly encourage" unlawful "conduct *within the boundaries of the United States.*" *The Bremen*, 407 U.S. at 16 (emphasis added). The transaction between Petitioners and Lloyd's was no more international in character than the purchase of British Petroleum stock by an American investor.

The Fifth Circuit's reasoning, if accepted, permits contractual waivers of the substantive protections of the securities and consumer protection laws anytime the security or product was being offered by a foreign company in the United States. The holding could spawn a whole series of abuses. For example, foreign companies could incorporate in a country that has no consumer protection or securities laws and sell goods or securities in the United States through a series

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[8] Even if it does, Congress intended the Securities Exchange Act to have a broad reach, including international transactions. *See,* 25 U.S.C. §§ 78l(g)(1)(broadly extending reach of the registration requirements to the full extent of the interstate commerce powers); 78l(g)(2)(providing a mechanism for foreign issuers to apply to the SEC for an exemption); 78c(a)(17)(defining interstate commerce to include commerce between any state and any foreign country.)

of misrepresentations without any concern of liability from purchasers or investors. Alternatively, a well-connected company could do what Lloyd's did here. Lloyd's persuaded its government to pass laws specifically designed to protect Lloyd's and then used FS/COL clauses imposed after the fact to take advantage of those laws.

F. The other policy considerations present in *Scherk* do not apply.

None of the policy considerations identified by the Court in *Scherk* for enforcing forum selection clauses in truly international transactions applies here. *Scherk* teaches that the reason for the presumption of enforceability of an arbitration or FS/COL clause is the need for certainty in international transactions about where disputes will be litigated and the law to be applied. Prior to the FS/COL clause, there was no uncertainty: Lloyd's knew that its acts in Texas subjected it to Texas and United States law in Texas courts. Also, any need for certainty must be balanced against Congress's express concern about "the need to protect U.S. investors who purchase foreign securities, such as foreign bonds, and about the increasing amount of the investments made by U.S. citizens in foreign securities." S. Rep. No. 73-1455 (1934).

In this case, Lloyd's conduct belies its purported "practical interest" and "need for certainty" in specifying the English forum. Lloyd's did not seek or require a FS/COL clause in Petitioners' original contracts. App. 101a. The FS/COL clause "did not coincide with Lloyd's initial efforts to recruit names outside England." App. 70a-71a, 79a. Lloyd's had been heavily recruiting investors outside of England for years, but did not mandate the FS/COL clause until 1986, after the passage of the Lloyd's Act of 1982, "just as reports started to surface that American Names planned to sue Lloyd's, and shortly before it became impossible for Lloyd's to continue concealing the extent of its problems." App. 79a-80a. Lloyd's mandated the FS/COL clause through an adhesion contract, after it had control of Petitioners' letters of credit. App. 83a. The evidence shows that Lloyd's motive for the FS/COL clause was not predictability, but to perpetrate a fraud. App.

80a-83a. In addition, the Court in *Scherk* favored the use of forum selection clauses in arms length dealings between sophisticated business entities. 417 U.S. at 515. Here, however, Lloyd's knowledge was superior to Petitioners, and Petitioners discovered only what Lloyd's chose to disclose. App. 39a. The FS/COL clause at issue did not result from an arms-length transaction.

The Fifth Circuit's contention that requiring equivalent remedies will "render all forum selection clauses worthless" and impede international transactions is equally unavailing. The Fifth Circuit cites language from *Roby* claiming that under the district court's test "[a] plaintiff would simply have to allege violation of *his country's* tort law . . . in order to render nugatory any forum selection clause . . . ." App. 24a, *citing Roby,* 996 F.2d at 1366. The Fifth Circuit argument misapplies both *The Bremen* and *Roby.*

Not every allegation of entitlement to a local law remedy will invalidate a forum selection clause. Plaintiff must plead a statutory remedy that the legislature has mandated is unwaivable, or that, if waived, would otherwise violate the strong public policy of the forum. *The Bremen,* 407 U.S. at 16. This is not a case where the legislature has not addressed the waiver issue or where it has only implied that waiver would violate public policy. The legislative determinations in this case could not be clearer. The statutes explicitly state that the protections cannot be waived and the Texas legislature recognized that waiver of the DTPA would be "contrary to public policy." DTPA § 17.42(a). If the public policies reflected in those statutes are not sufficient to prevent waiver, no public policy will ever be sufficient and *The Bremen* public policy exception is worthless.

G. The Fifth Circuit's holding that foreign companies selling goods or securities in the United States are immune from civil liability for violations of federal and state laws undermines the effectiveness of those laws and negatively impacts foreign and domestic commerce.

If allowed to stand, the Fifth Circuit's decision will render the securities laws impotent to protect United States citizens in a growing number of transactions. In a world where commerce is increasingly international, the Fifth Circuit will allow foreign companies that come to the United States to solicit investors and consumers, to avoid the application of United States securities and consumer protection laws by the expedient of inserting a foreign FS/COL clause. The Fifth Circuit's decision will hurt consumers, investors and legitimate businesses. The consumer and investor protections that the legislatures intended and the confidence in the markets that those laws fostered will be destroyed. Consumers and investors will be defrauded by unscrupulous foreign companies and the American businesses that must comply with United States laws will be unfairly disadvantaged in competing with those foreign companies for consumer and investor dollars.

Because United States businesses are required to comply with foreign law when they do business in foreign countries, it is not unreasonable or unduly "parochial" to require foreign entities to comply with American law when they do business in the United States. App. 69a-70a. It is ironic that the Fifth Circuit was concerned that it would be unduly parochial to apply the unwaivable protections of United State laws to securities transactions solicited in the United States. The Lloyd's acts were passed solely to benefit Lloyd's by *inter alia* limiting Lloyd's liability. Apparently England has no similar concern about appearing unduly parochial.

II. Does the Fifth Circuit's Interpretation of *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), Conflict with the Holdings in *Moseley v. Electronic & Missile Facilities*, 374 U.S. 167 (1963), and *C.B.S. Employees Federal Credit Union v. Donaldson*, 912 F.2d 1563 (6th Cir. 1990)?

The *Leslie* court found that Lloyd's obtained Petitioner's "accession to the forum selection clause by fraud . . . [and] overreaching."[9] App. 83a. Lloyd's made at least three material misrepresentations regarding the FS/COL clause: (1) that it was required by the Lloyd's Act of 1982 (App. 40a n.24); (2) that application of English law, especially in connection with the Lloyd's Act of 1982, actually increased Petitioners' legal rights (App. 81a), and (3) that execution of the FS/COL clause was not a substantive change to the parties' relationship. (App. 81a).

The *Leslie* court found the intended effect of the FS/COL clause on Petitioners' "substantive rights was [not] inadvertent or accidental," but was part of a fraudulent scheme by Lloyd's to deprive American investors of the protections of federal securities laws. App. 64a, 79a. The *Leslie* court also found that the FS/COL clause was presented to Petitioners on a take-it-or-leave-it basis, Leslie had already been an investor for nearly a decade, had experienced some losses, and believed that Lloyd's would take his irrevocable letter of credit which exceeded $100,000.00. App. 83a. Leslie did not have the "option of rejecting [the FS/COL clause] with impunity." App. 83a.

The Fifth Circuit dismissed the *Leslie* court's findings, claiming that the "claims of fraud or overreaching [were not] . . . aimed straight at the FS/COL clause." App. 13a. The Fifth Circuit relied on *Prima Paint* and footnote 14 from this Court's opinion in *Scherk*. 415 U.S. at 519 n.14 ("an arbitration or forum-selection clause in a contract is not

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9 This claim was presented by three of the Petitioners: Leslie, Kaliff, and Jack Taylor. The remaining Petitioners were parties to the *Richards* case and asserted the fraud and overreaching claims there.

enforceable if the inclusion of that clause in the contract was the product of fraud or coercion").

A. *Prima Paint* applies only to arbitration clauses, not forum selection clauses.

Prima Paint should not have controlled the court's decision. In *Prima Paint*, the Court held that, pursuant to the United States Arbitration Act, 9 U.S.C. § 1 *et. seq.* (1970), an arbitration clause is severable from the rest of a contract as a matter of federal law. Accordingly, the Court held that the Arbitration Act required enforcement of an arbitration clause absent proof that the clause itself was induced by fraud. 388 U.S. at 403-04 ("the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.") There is no federal statute which requires that Petitioners show that the forum selection clause at issue in this case was fraudulently induced apart from the fraudulent inducement of the entire contract. Unlike the plaintiff in *Prima Paint*, Leslie need only show that the contract containing that clause was fraudulently induced.[10/]

The Supreme Court found it significant that, pursuant to the statutory scheme in arbitration cases, the district court retains jurisdiction and can ensure that the legitimate interests of United States laws has been addressed at the enforcement stage. *Vimar,* 115 S. Ct. at 2329-2322 (1995). Presumably, this protection extends to the arbitrator's evaluation of fraud in the inducement of the contract. *Prima Paint*, 388 U.S. at 403-6. Since the forum selection clause here is not governed by the Arbitration Act and no United States court would retain jurisdiction to review the rulings of the English court, *Prima Paint* should not apply.

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10 Nevertheless, the *Leslie* court held that Leslie proved fraud directed to the FS/COL clause itself. App. 80a-83a.

B. If *Prima Paint* does apply, the Fifth Circuit's reading of *Prima Paint* is inconsistent with this Court's holding in *Moseley* and the Sixth Circuit's holding in *Donaldson.*

Reversing the *Leslie* court, the Fifth Circuit essentially held that allegations of fraud that go *both* to the contract as a whole *and* the forum selection clause cannot invalidate the forum selection clause. The Fifth Circuit's holding is contrary to this Court's decision in *Moseley* and promotes an overbroad interpretation of *Prima Paint.* In *Moseley*, the Court held that where a plaintiff's pleading attacks the contract in general, as well as the arbitration clause contained therein, the allegation of fraud as to the arbitration clause should be decided by the district court. 374 U.S. at 171. *See also, Donaldson*, 912 F.2d at 1568 ("in this case, plaintiff's complaint alleges defendants fraudulently procured their assent to the margin agreement *and* the arbitration clause . . . Thus the holding of *Moseley* and *Prima Paint* requires that the district court adjudicate the validity of the arbitration clause.") The Fifth Circuit, however, held that *Prima Paint* permits federal adjudication of the fraudulent inducement issue only if the claim of fraud or misrepresentation relates exclusively to the making of the arbitration clause and despite the district court's contrary finding. Thus, the Fifth Circuit's holding that misrepresentations that induced execution of the contract as a whole could not also be directed at the forum selection clause in particular is contrary to *Moseley,* and should be reversed. If allowed to stand, the Fifth Circuit's application of *Prima Paint* will not only nullify *Moseley,* it will render the fraud and overreaching exception to *The Bremen* meaningless. No plaintiff could ever prove that the forum selection clause was procured by fraud, unless the clause — and only the clause — was written in invisible ink.

The *Leslie* court correctly held that Leslie relied on the misrepresentations and false assurances by Lloyd's when he signed the FS/COL clause and that Lloyd's intended Leslie's reliance. App. 82a. Leslie was not required here to investigate the provisions of the Lloyd's Act of 1982. *Martin v. Mbank El Paso, N. A.*, 947 F. 2d 1278, 1281 (5th Cir. 1991); *Koral Indus. v. Security-Connecticut Life Ins. Co.*, 802

S.W. 2d 650, 651 (Tex. 1990). Leslie was entitled to rely on Lloyd's misrepresentation regarding the Lloyd's Act of 1982. "A party having superior knowledge, who takes advantage of another's ignorance of the law to deceive him by studied concealment or misrepresentation, can be held responsible for this conduct." *Fina Supply, Inc. v. Abilene Nat. Bank*, 727 S.W. 2d 537, 540 (Tex. 1987). Moreover, as a private act of Parliament, the Lloyd's Act of 1982 is not published in a volume of public general acts and is not given the same level of distribution among lawyers. R. 3393. Finally, even if Leslie had sought legal advice, no one advising Leslie about the FS/COL clause could have known of the massive fraud that had already been committed by Lloyd's.

Lloyd's false representations went to the heart of the substance of English law, the need for the FS/COL clause and the intended effect of the FS/COL clause. As further evidence of Lloyd's intent to defraud Petitioners through the FS/COL clause, the *Leslie* court noted that Lloyd's released information about the magnitude of the asbestos liability in its market immediately after the Names executed the FS/COL clause. App. 82a. The *Leslie* court also found that Petitioners received no benefit from the new agreement. App. 71a. Based on the above, combined with Lloyd's fraudulent representations that Petitioners were getting "full disclosure," that Lloyd's could be trusted, and that Petitioners' substantive rights were not being effected by the agreement, the *Leslie* court did not commit error in determining the FS/COL clause itself was induced by fraud. App. 76a. The Fifth Circuit's decision to reverse the *Leslie* court should be reversed.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant Certiorari and reverse the Opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS

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APPENDIX A

121 F.3d 956
(Cite as: 121 F.3d 956)

Stuart G. HAYNSWORTH, et al., Plaintiffs-Appellants,
v.
THE CORPORATION, a/k/a Lloyd's of London, a/k/a Lloyd's, a/k/a the Council of Lloyd's, a/k/a the Society of Lloyd's, a/k/a the Committee of Lloyd's,
Defendant-Appellee.

Charles Robert LESLIE, Plaintiff-Appellee,
v.
LLOYD'S OF LONDON, etc., et al., Defendants, Lloyd's of London, a/k/a the Corporation of Lloyd's, a/k/a Lloyd's, a/k/a the Society of Lloyd's, a/k/a the Committee of Lloyd's, Defendant-Appellant.

Nos. 96-20769, 96-20805.

United States Court of Appeals,
Fifth Circuit.

Aug. 29, 1997.

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Paul D. Flack, Clements, O'Neill, Pierce & Nickens, Houston, TX, for Charles Robert Leslie, Plaintiff-Appellee.

Richard H. Walker, John W. Avery, Securities and Exchange Commission, Washington, DC, for Securities and Exchange Commission, Amicus Curiae.

Appeals from the United States District Court for the Southern District of Texas.

Before SMITH, BARKSDALE and BENAVIDES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

These are consolidated appeals in suits by individual underwriters against the Corporation of Lloyd's ("Lloyd's"),[1] the central administrative body of the insurance market known as Lloyd's of London. In No. 96-20769, Stuart Haynsworth and thirty-three others appeal the dismissal of their suits based on a contractual forum selection/choice-of-law clause and, in the alternative, forum non conveniens ("f.n.c."). In No. 96-20805, Lloyd's appeals the refusal to dismiss on the same grounds. Concluding that the parties are bound by the contracts they entered into, we affirm the judgment of dismissal in No. 96-20769 and reverse and render a judgment of dismissal in No. 96-20805.

Some background as to the nature and structure of Lloyd's of London is a necessary introduction to the issues. Lloyd's is a 300-year-old market in which individual and corporate underwriters known as "Names" underwrite insurance. The Corporation of Lloyd's, which is

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1. We employ this shorthand with the recognition that, strictly speaking, Lloyd's of London is simply a trademark referring to a market for insurance, and the Corporation of Lloyd's the entity that governs that market. For convenience, however, we use "Lloyd's" throughout this opinion to refer collectively to the various defendants in both appeals, distinguishing between separate entities by use of their specific names as necessary.

I.

also known as the Society of Lloyd's, provides the building and personnel necessary to the market's administrative operations. The Corporation is run by the Council of Lloyd's, which promulgates "Byelaws," regulates the market, and generally controls Lloyd's administrative functions.

Lloyd's does not underwrite insurance; the Names do so by forming groups known as syndicates. Within each syndicate, participating Names underwrite for their own accounts and at their own risk. That is, as a matter of English law, Names' liability is several rather than joint, and individual Names are not responsible for the unfulfilled obligations of others. Each syndicate is managed and operated by a Managing Agent, who owes the Names a contractual duty to conduct the syndicate's affairs with reasonable care. Syndicates have no legal existence or identity apart from the Names they comprise.

Names must become members of Lloyd's in order to participate in the market. Prospective members are solicited and assisted in the process of joining by Member's Agents, whose duties to the Names are fiduciary in nature. Names must pass a means test to ensure their ability to meet their underwriting obligations, post security (typically, a letter of credit), and personally appear in London before a representative of the Council of Lloyd's to acknowledge their awareness of the various risks and requirements of membership, and in particular the fact that underwriting in the Lloyd's market subjects them to unlimited personal liability.

Participation in the market also requires the execution of a number of contracts and agreements, the most important of which is the General Undertaking, the standardized contract between Lloyd's and the individual Names. Names additionally must enter into a Member's Agent's agreement, the contract that defines the relationship between the Name and his chosen Member's Agent, and one or more Managing Agent's agreements, which define the relationships between the Name and the Managing Agents of the syndicates he wishes to join. Under the

present version of Lloyd's Byelaws, each of these agreements must contain clauses designating England as the forum in which disputes are to be resolved and choosing English law as the law governing such disputes.

Prior to 1986, the General Undertaking contained a provision requiring that disputes with agents or other Names be submitted to arbitration in London. Although this provision apparently did not cover disputes between Names and Lloyd's itself, it did require arbitration of claims against virtually any other entity, including anyone "not a party to any agreement with [the Name] referring such claims to arbitration." Following Parliament's passage of the Lloyd's Act of 1982, all Names, as a condition of continuing to be Names, were required to sign a new General Undertaking (the "1986 General Undertaking"), clause 2 of which replaced the arbitration provision with language that is the focus of this case:

> 2.1 The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.
>
> 2.2 Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding (together in this Clause 2 referred to as "Proceedings") arising out of or relating to such matters shall be brought in such courts and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England and irrevocably waives any objection which it may have now or hereafter to (a) any Proceedings being brought in any such court as is referred to in this Clause 2 and (b) any claim that any such Proceedings have been brought in an inconvenient forum and further irrevocably agrees that a judgment

> in any Proceedings brought in the English courts shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction.
>
> 2.3 The choice of law and jurisdiction referred to in this Clause 2 shall continue in full force and effect in respect of ***960** any dispute and/or controversy of whatsoever nature arising out of or relating to any of the matters referred to in this Undertaking notwithstanding that the Member ceases, for any reason, to be a Member of, or to underwrite insurance business at, Lloyd's.

Each of the plaintiffs in the appeals before us signed the 1986 General Undertaking and agreed to these forum selection/choice of law provisions, which we refer to as the "FS/COL clause."

Although underwriting at Lloyd's appears generally to have been a profitable endeavor up until the mid-1980's, at that time massive liability for pollution and asbestos-related injuries began to change the situation somewhat. According to the plaintiffs, when Lloyd's full-time members or "insiders" became aware of these risks, they concocted a sinister scheme to shift the liabilities onto unsuspecting American investors such as the plaintiffs.

In order to escape these liabilities, they claim, the insiders recruited new Names and steered them into syndicates, where they unwittingly underwrote high-risk asbestos reinsurance and toxic waste obligations, of which policies the insiders wanted no part. As a consequence of being placed in these syndicates, the plaintiffs allege, they have incurred large financial losses already and remain liable for a great deal more.

The massive excess losses sustained by Names in the late 1980's and early 1990's—by Lloyd's estimate, something in the neighborhood of $22 billion—have spawned a series of lawsuits throughout the United States. The instant appeals are but the latest chapter in this litigation, a brief summary of which is instructive to the issues before us. In *Hirsch v. Vaughan*, No. 89-2563, 904 F.2d 704 (5th

Cir. May 31, 1990) (unpublished), an American Name sued Lloyd's and his agents, claiming common law fraud. We dismissed on the basis of f.n.c., finding the suit "aim[ed] at the heart of the unique self-regulatory mechanism within Lloyd's, which is a product of complex English legislation." Slip op. at 7.

Various Names next brought suit in the Second, Seventh, and Tenth Circuits, claiming that Lloyd's' above-described alleged conduct violated the federal securities laws. Lloyd's defended in part on the ground that the 1986 General Undertaking's FS/COL clause—the clause at issue here—requires all disputes to be litigated in England, to which the Names responded that the FS/COL clause constitutes an impermissible attempt to waive the protections of U.S. securities laws. The Second, Seventh, and Tenth Circuits rejected the Names' arguments, concluding that the securities laws' antiwaiver provisions did not bar dismissal of the suits.[2] A similar contention as to the antiwaiver provisions of the Ohio securities laws was later rejected by the Sixth Circuit.[3] More recently, the Fourth Circuit joined this chorus of authority in rejecting the claim that the federal securities statutes render the FS/COL clause void.[4] A number of courts also have rejected Names' attempts to avoid their contractual obligations by alleging that their agreement to the 1986 General Undertaking was procured by fraud, or that the FS/COL clause is unconscionable.[5]

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2. See *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1366 (2d Cir.1993); *Bonny v. Society of Lloyd's*, 3 F.3d 156, 162 (7th Cir.1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir.1992).

3. See *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1229-32 (6th Cir.1995).

4. See *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir.1996), mandamus denied sub nom. In re Allen, — U.S. ——, 117 S.Ct. 2497, 138 L.Ed.2d 1004 (1997).

5. See *Bonny*, 3 F.3d at 160 n. 10; Riley, 969 F.2d at 960; *Stamm v. Barclays Bank*, 960 F.Supp. 724, 730-33 (S.D.N.Y.1997); *Tufts v. Corporation of Lloyd's*, No. 95-CIV-3480(JFK), 1996 WL 533639, at *5-*7 (S.D.N.Y. Sept.19, 1996); *McDade v. NationsBank of Tex.*, No. H-94-3714, slip op. at 4-5 (S.D. Tex. June 26, 1995) (unpublished); see also *Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 210-11 (7th Cir.1993) (rejecting claim that the FS/COL clause should not be enforced because litigation in England would be so "gravely difficult and inconvenient as to deprive [plaintiffs] of their day in court.").

Indeed, aside from one of the courts below in the instant case, only one court—the Ninth Circuit—has refused to enforce the FS/COL in a suit brought by Names against Lloyd's.[6] Not surprisingly, the plaintiffs rely heavily on Richards and urge us to adopt its conclusion that the antiwaiver provisions of the federal securities laws prevent the FS/COL clause from being enforced. *See id.* at 1426. Following the arguments that have been rejected by other courts, they also claim that Lloyd's procured their agreement to the General Undertaking, and, in particular, the FS/COL clause, by fraud and overreaching.

The first of the instant cases—No. 96-20769 ("Haynsworth ")—is thus a suit by seventy-seven Names against Lloyd's claiming fraud, breach of fiduciary duty, violations of the Texas Deceptive Trade Practice-Consumer Protection Act (the "DTPA"), Tex. Bus. & Com.Code Ann. § 17.41 *et seq.* (Vernon 1987 & Supp.1997), and violations of the Securities Act (the "Texas Securities Act"), Tex.Rev.Civ. Stat. Ann. art. 581-1 et seq. (Vernon 1964 & Supp.1997). Shortly after Haynsworth was filed, Lloyd's moved to dismiss based on the General Undertaking's FS/COL clause, f.n.c., and, as to fifty- three of the plaintiffs who already had litigated or were then actively litigating their claims in the Second and Ninth Circuits, collateral estoppel. On July 17, 1996, the district court dismissed the case on the basis of the FS/COL clause and, in the alternative, f.n.c., and thirty-four of the plaintiffs now appeal that dismissal.[7]

The second case—No. 96-20805 ("Leslie ")—arises from Charles Leslie's action against Lloyd's alleging violations of the federal securities laws (specifically, 15 U.S.C. § 78j(b) and rule 10b-5, 17 C.F.R. 240.10b-5), fraud, breach of fiduciary duty, and violations of the DTPA. As in Haynsworth, Lloyd's moved to dismiss on the basis of

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6. See *Richards v. Lloyd's of London*, 107 F.3d 1422, 1424-30 (9th Cir.1997), reh'g en banc granted, 121 F.3d 565 (9th Cir.1997).

7. Many of these plaintiffs-appellants were or still are litigants in suits against Lloyd's in the Second and Ninth Circuits. Because we affirm the Haynsworth judgment of dismissal on the merits of the forum selection clause, however, we need not and do not reach any issues of collateral estoppel.

the FS/COL clause and f.n.c. The district court denied the motion but certified the questions presented by it for interlocutory appeal under 28 U.S.C. § 1292(b).

II.

Although there previously was some uncertainty on this point, we recently have held that the enforceability of a forum selection clause is a question of law reviewable *de novo*. *Mitsui & Co. (USA), Inc. v. Mira M/V*, 111 F.3d 33, 35 (5th Cir.1997). As the parties do not raise it, we therefore need not reach the considerably more enigmatic question of whether motions to dismiss on the basis of forum selection clauses are properly brought as motions under Fed.R.Civ.P. 12(b)(1), 12(b)(3), or 12(b)(6), or 28 U.S.C. § 1406(a).[8]

[1] Before considering the core issues, we must address whether federal or Texas law applies to the FS/COL clause enforceability determination. Federal jurisdiction in *Haynsworth* is based on diversity; jurisdiction in *Leslie* is based both on diversity and on the presence of a federal question. Both district courts relied on a combination of federal and Texas authorities in reaching their respective enforceability conclusions, although the Leslie court expressly recognized that federal law governs the question. Other courts that have considered the enforceability of the 1986 General

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8. Compare, e.g., *AVC Nederland B.V. v. Atrium Inv. Partnership*, 740 F.2d 148, 152-59 (2d Cir.1984) (permitting rule 12(b)(1) motion) with *Albany Ins. Co. v. Almacenadora Somex, S.A.*, 5 F.3d 907, 909 & n. 3 (5th Cir.1993) (treating motion as one under rule 12(b)(3)) and *Commerce Consultants Int'l, Inc. v. Vetrerie Riunite, S.p.A.*, 867 F.2d 697, 699-700 (D.C.Cir.1989) (affirming dismissal under rule 12(b)(3)) with *Lambert v. Kysar*, 983 F.2d 1110, 1112 n. 1 (1st Cir.1993) (stating that rule 12(b)(6) is the appropriate vehicle) with *International Software Sys. v. Amplicon*, 77 F.3d 112, 114 (5th Cir.1996) (analyzing as motion to dismiss under 28 U.S.C. § 1406(a)). See also *In re Fireman's Fund Ins. Cos.*, 588 F.2d 93, 94 (5th Cir.1979) (approving order transferring venue pursuant to 28 U.S.C. § 1404(a)).

Undertaking's FS/COL clause in similar situations have either *962 pretermitted the choice of law issue or applied federal law without discussion.[9]

The Leslie court's conclusion on this issue was correct: Federal law applies to the FS/COL clause enforceability determination. In *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972), a decision we discuss in detail infra, the Court set forth a framework of enforceability standards to be applied by federal courts sitting in admiralty. *Id.* at 10- 15, 92 S.Ct. at 1913-16. Just two years later, the Court implicitly extended *The Bremen's* holding beyond the realm of admiralty by applying it to a claim brought under the federal securities laws. See *Scherk v. Alberto- Culver Co.*, 417 U.S. 506, 518-21, 94 S.Ct. 2449, 2456-58, 41 L.Ed.2d 270 (1974). Following that cue, this court and others have not hesitated to apply these federal enforceability standards in non-admiralty cases.[10]

Whether *The Bremen's* rules should be applied by federal courts sitting in diversity is a more difficult question, but fortunately one that this circuit recently has resolved. In International Software Sys., 77 F.3d at 114-15, we held that *The Bremen's* rules extend to dismissal determinations based on forum selection clauses in diversity cases, a holding that governs the case at bar. Because of this, the district courts a quo erred insofar as they applied Texas rather than federal law in their respective enforceability determinations. The proper law to

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9. *See Shell*, 55 F.3d at 1229 (declining to decide the issue on the ground that federal and Ohio law treat forum selection clauses similarly); *Richards*, 107 F.3d at 1426-29 (applying federal law); *Bonny*, 3 F.3d at 159-61 (same); *Hugel*, 999 F.2d at 209-11 (same); *Riley*, 969 F.2d at 956-58 (same); *Stamm*, 960 F.Supp. at 728-30 (same).

10. *See, e.g., Seattle-First Nat'l Bank v. Manges*, 900 F.2d 795, 799 (5th Cir.1990) (bankruptcy case); *AVC Nederland B.V. v. Atrium Inv. Partnership*, 740 F.2d 148, 156-60 (2d Cir.1984) (federal securities fraud case); *In re Fireman's Fund Ins. Cos.*, 588 F.2d 93, 95 (5th Cir.1979) (Miller Act).

apply to such questions is federal, whether jurisdiction be based on diversity, a federal question, or some combination of the two.[11]

III.

A.

In *The Bremen*, 407 U.S. at 9, 92 S.Ct. at 1912-13, the Court, rejecting as a "parochial concept" the idea that "notwithstanding solemn contracts ... all disputes must be resolved under our laws and in our courts," held that federal courts presumptively must enforce forum selection clauses in international transactions. Since *The Bremen*, the Court has consistently followed this rule and, in fact, has enforced every forum selection clause in an international contract that has come before it.[12]

Public policy weighs strongly in favor of *The Bremen's* presumption, because uncertainty as to the forum for disputes and applicable law "will almost inevitably exist with respect to any contract touching two or more countries." *Scherk*, 417 U.S. at 516, 94 S.Ct. at 2455. That is, "[t]he elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *The Bremen*, 407 U.S. at 13-14, 92 S.Ct. at 1915. As we recently stated in a case implicating these concerns, "[t]he Supreme

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11. Accord *Jones v. Weibrecht*, 901 F.2d 17, 18-19 (2d Cir.1990) (applying federal law to enforceability determination in diversity contract case); *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 512-13 (9th Cir.1988) (same; diversity tort case); *Bryant Elec. Co. v. City of Fredericksburg*, 762 F.2d 1192, 1196-97 (4th Cir.1985) (same; diversity contract case).

12. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-42, 115 S.Ct. 2322, 2330, 132 L.Ed.2d 462 (1995); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595, 111 S.Ct. 1522, 1528, 113 L.Ed.2d 622 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640, 105 S.Ct. 3346, 3361, 87 L.Ed.2d 444 (1985); *Scherk*, 417 U.S. at 519-20, 94 S.Ct. at 2457.

Court has therefore instructed American courts to enforce [forum selection and choice of law] clauses in the interests of international comity and out of deference to the integrity and proficiency of foreign courts." *Mitsui*, 111 F.3d at 35 (citing *Mitsubishi*, 473 U.S. at 629, 105 S.Ct. at 3355-56).

[2][3][4] The presumption of enforceability may be overcome, however, by a clear showing that the clause is " 'unreasonable' under the circumstances." *The Bremen*, 407 U.S. at 10, 92 S.Ct. at 1913. Unreasonableness potentially exists where (1) the incorporation of the forum selection clause into the agreement was the product of fraud or overreaching; (2) the party seeking to escape enforcement "will for all practical purposes be deprived of his day in court" because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or (4) enforcement of the forum selection clause would contravene a strong public policy of the forum state. *Carnival Cruise Lines*, 499 U.S. at 595, 111 S.Ct. at 1528; *The Bremen*, 407 U.S. at 12-13, 15, 18, 92 S.Ct. at 1914-15, 1916, 1917. The party resisting enforcement on these grounds bears a "heavy burden of proof." *The Bremen*, 407 U.S. at 17, 92 S.Ct. at 1917.

The plaintiffs rest their arguments on the first and fourth of these exceptions. Specifically, they allege that the General Undertaking's FS/COL clause is unenforceable because of fraud and overreaching, and violates both federal and Texas public policy. The Haynsworth district court rejected these arguments, enforced the clause pursuant to *The Bremen's* presumption, and dismissed the suit. The Leslie district court did the opposite, concluding that Leslie had established he was induced into agreeing to the clause through fraud and overreaching and that the clause violates both United States and Texas public policy.

B.

[5] Fraud and overreaching must be specific to a forum selection clause in order to invalidate it. That is, *The Bremen's* exception for unreasonable fraud or overreaching

> does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud ... the clause is unenforceable. Rather, it means that an arbitration or forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion.

Scherk, 417 U.S. at 519 n. 14, 94 S.Ct. at 2457 n. 14 (emphasis in original) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967)). Thus, allegations of such conduct as to the contract as a whole—or portions of it other than the FS/COL clause— are insufficient; the claims of fraud or overreaching must be aimed straight at the FS/COL clause in order to succeed.[13]

The plaintiffs protest that *Prima Paint* dealt exclusively with arbitration clauses under the United States Arbitration Act and that there is no authority for the proposition that the above rule applies to forum selection or choice- of-law clauses as well. This flatly contradicts the language of *Scherk*, which at a minimum extended the rule of *Prima Paint* to forum selection clauses in general. See *Scherk*, 417 U.S. at 519 n. 14, 94 S.Ct. at 2457 n. 14. Moreover, *Scherk* and later courts have noted that "foreign arbitration clauses are but a subset of foreign forum selection clauses in general." *Vimar Seguros*, 515 U.S. at 534, 115 S.Ct. at 2326 (citing *Scherk*, 417 U.S. at 519, 94 S.Ct. at 2457).

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13 *See, e.g., Prima Paint*, 388 U.S. at 403-04, 87 S.Ct. at 1805-06; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 637 F.2d 391, 398 & n. 11 (5th Cir. Unit B Feb.1981) (holding that to render arbitration clause unenforceable, coercion and duress must relate specifically to the clause rather than to the contract as a whole).

In *Mitsui*, we rebuffed a similar attempt to distinguish between arbitration and forum selection/choice-of-law clauses for enforceability purposes, noting that even on the *Vimar Seguros's* dissent's view, "in relevant aspects, there is little difference between the two." *Mitsui*, 111 F.3d at 36 (quoting *Vimar Seguros*, 515 U.S. at 548 n. 7, 115 S.Ct. at 2333 n. 7 (Stevens, J., dissenting)). The proposed distinction contradicts both Supreme Court and Fifth Circuit precedent and consequently must be rejected.

[6] It follows that, to the extent the plaintiffs claim fraud and overreaching in aspects of the General Undertaking other than the FS/COL clause, their allegations are irrelevant to enforceability. As Lloyd's points out, many of the plaintiffs' claims of fraud and overreaching fall squarely into this category. Though we need not detail them all, by way of example these include the contention that Lloyd's failed adequately to disclose the effect of the Lloyd's Act of 1982, the assertion that Lloyd's disclosed critical risks only after the plaintiffs had been induced into signing the General Undertaking, and the claim that Lloyd's conditioned the Names' continued membership on signing the version of the General Undertaking that contained the FS/COL clause. While these allegations, if proved, might very well be relevant to the merits of the claims in the absence of a forum selection clause, they are wholly inapposite to our enforceability determination, which must of course precede any analysis of the merits. *See Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750, 752 (5th Cir.1995).

The plaintiffs argue that, because the FS/COL clause was the primary difference between the 1986 General Undertaking and previous agreements, their evidence of fraud regarding the General Undertaking as a whole is actually evidence as to the FS/COL clause specifically. We note initially that the FS/COL clause is not the only difference between the 1986 and pre-1986 General Undertakings; the 1986 version added a provision by which the Names agreed to abide by the dictates of, and Byelaws promulgated under, the Lloyd's Act of 1982, which substantially altered the regulatory regime in which Lloyd's operates. The 1986 General Undertaking also, for the first time, required Names to obey "any direction given or provision or

requirement made or imposed by the Council," which at the time was a relatively new entity created by the Lloyd's Act of 1982.

Moreover, the inclusion of the FS/COL clause was not the radical change that plaintiffs claim it to be, as the previous version of the General Undertaking had contained an arbitration clause requiring that disputes with other Names or agents be arbitrated in London. Although the FS/COL clause in the 1986 General Undertaking is greater in scope, we have already noted that such arbitration clauses are merely a specialized subset of the larger group of forum selection clauses. In short, the pre- and post-1986 General Undertakings are sufficiently different that the 1986 version cannot be said merely to have added the FS/COL clause. The allegations that go to fraud or overreaching in the General Undertaking as a whole are just that: allegations that go to the General Undertaking as a whole. *Scherk* and *Prima Paint* render them inapposite.

[7] Precious little remains of the plaintiffs' contentions after they run the gamut of this requirement. If any argument as to fraud plausibly survives, it is that Lloyd's failed adequately to disclose the effects of the FS/COL clause when it presented the plaintiffs with the version of the General Undertaking that included it. According to the plaintiffs, they were fraudulently induced to sign the 1986 General Undertaking in reliance on assurances by Lloyd's[14] that the new agreement contained "few variations of substance" from the old.[15] This, they claim, was a fraudulent omission specifically as to the FS/COL, because nothing in Lloyd's description of these changes mentioned it.

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14. In fact, the assurances were by various Member's Agents allegedly acting at Lloyd's direction.

15. Lloyd's claims that, to the extent these assurances were made, they referred to the agreements between the Names and their respective Members' Agents rather than to the 1986 General Undertaking. Although the record appears to support Lloyd's on this point, we need not resolve this highly fact-specific dispute, for, as discussed infra, the FS/COL clause is enforceable in any case. For the limited purposes of this discussion, we therefore adopt arguendo the Leslie district court's finding that the statements referred to the 1986 General Undertaking.

We find this argument unpersuasive. In *Bhatia v. Johnston*, 818 F.2d 418 (5th Cir.1987), a plaintiff attempted to avoid an arbitration clause in a brokerage agreement by claiming he had been told the clause was "the same as" that in his previous contract. *Id.* at 422 n. 5. Applying Prima Paint, we held that whatever misrepresentations might have been made were "related to the entirety" of the new agreement and therefore were insufficient to block enforcement of the clause. *Id.* at 422. The plaintiffs' argument is at ***965** best no different from Bhatia's, and is more likely quite a bit weaker insofar as they were at least alerted to the existence of some "variations." Our holding in Bhatia compels the conclusion that their claims go to the 1986 General Undertaking as a whole and that they therefore cannot bar enforcement of the FS/COL clause.

[8] Alternatively, the fraud claim fails, even if plaintiffs' contentions somehow survive *Prima Paint*. The FS/COL clause was straightforward and was a prominent part of the one-and-one-half-page General Undertaking, and the plaintiffs are presumed to have known what it said.[16] The plaintiffs were sophisticated parties contracting volun tarily; it is not for us to impose a duty upon one party to counsel the other as to the risks and benefits of a contract. Indeed, as Lloyd's points out, there was nothing to explain. The duty was the plaintiffs' to read the plain terms of the agreement, not Lloyd's to lecture them about it.

[9] These conclusions effectively dispose of the plaintiffs' claims of overreaching, as well. In essence, they argue that Lloyd's engaged in overreaching by forcing the Names to choose between signing a contract with the FS/COL clause and terminating their

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16. E.g., *In re Cajun Elec. Power Coop.*, 791 F.2d 353, 359 (" 'A person who signs a written instrument is presumed to know its contents and cannot avoid its obligations by contending that he did not read it, or that it was not explained or that he did not understand it.' ") (quoting *Smith v. Leger*, 439 So.2d 1203, 1206 (La.App. 1st Cir.1983)); *Bonny*, 3 F.3d at 160 n. 10; *St. Petersburg Bank & Trust Co. v. Boutin*, 445 F.2d 1028, 1032 (5th Cir.1971).

membership as Names. The Leslie district court agreed, reasoning that Lloyd's "take-it-or-leave-it offer" unfairly deprived Leslie of "the option of rejecting with impunity."

We emphatically disagree. Although there is some ambiguity as to the precise boundaries of what constitutes "overreaching," a nebulous concept at best,[17] we can state with certainty that none occurred here. As Lloyd's points out, the argument that the 1986 General Undertaking constituted a "take-it-or- leave-it offer" goes to the contract as a whole and therefore cannot overcome the FS/COL clause under *Prima Paint.* As we recently stated in the context of an arbitration clause in an employment contract, the claim that an agreement "is an unconscionable contract of adhesion is an attack on the formation of the contract generally, not an attack on the arbitration clause itself." *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 749 (5th Cir. 1996).

Even were we not to apply *Prima Paint, Carnival Cruise Lines* would compel us to reject this argument on the merits. There, the Court enforced a forum selection clause against an unsophisticated cruise ship passenger, notwithstanding the disparity in the parties' bargaining power and the fact that the contract had not been subject to negotiation. 499 U.S. at 593-95, 111 S.Ct. at 1527-28. Aside from the fact that Haynsworth, Leslie, and the other plaintiffs are considerably more sophisticated than was the passenger in *Carnival Cruise Lines,* we find nothing of substance to distinguish that case from the case at bar. Indeed, a careful examination of the evidence underlying the plaintiffs' claims reveals that the 1986 General Undertaking was an agreement considerably more equitable than the one at issue there. *Carnival*

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17. "Overreaching" is "that which results from an inequality of bargaining power or other circumstances in which there is an absence of meaningful choice on the part of one of the parties." BLACK'S LAW DICTIONARY 1104 (6th ed. 1990).

Cruise Lines thus compels us to hold the plaintiffs to their respective contracts, including the FS/COL clause to which they duly agreed.[18]

C.

[10] The plaintiffs also contend that the General Undertaking's FS/COL clause is "unreasonable" because it contravenes public ***966** policy as embodied in the antiwaiver provisions of federal securities law, Texas securities law, and the Texas DTPA. The Leslie district court agreed with this argument; the Haynsworth district court did not. Although we are unable to identify any decision specifically addressing the FS/COL clause as regards the antiwaiver provisions of the Texas laws, five of our sister circuits have previously rejected this argument as to the federal statutes.[19] Besides the district court in Leslie, the only court that has ever refused to enforce the General Undertaking's FS/COL clause on these grounds is the Ninth Circuit. See *Richards*, 107 F.3d at 1426-28.

The antiwaiver provisions are straightforward. Section 14 of the Securities Act of 1933 provides: "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." 15 U.S.C. § 77n. Section 29(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(a), and the antiwaiver provision of the Texas Securities Act, TEX.REV.CIV. STAT. ANN. art. 581-33L (Vernon Supp.1997), are substantively

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18. Accord *Kevlin Serv., Inc. v. Lexington State Bank*, 46 F.3d 13, 15 (5th Cir.1995) (holding that The Bremen 's presumption of enforceability applies to forum selection clauses in form contracts); *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1154-55 (5th Cir.1992) (holding that adhesion contracts requiring arbitration of securities disputes are not unconscionable as a matter of law).

19 *See Allen*, 94 F.3d at 928-30; *Shell*, 55 F.3d at 1229-32; *Bonny*, 3 F.3d at 160-62, *Roby*, 996 F.2d at 1363-66; *Riley*, 969 F.2d at 957-58.

identical for purposes of the issue before us. Similarly, the antiwaiver provision of the DTPA provides generally that "[a]ny waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void." DTPA § 17.42(a), Tex. Bus. & Com.Code Ann. § 17.42(a) (Vernon Supp.1997).

As a threshold matter, Lloyd's argues that nothing Names acquire in the course of their relationship with Lloyd's constitutes a "security" within the meaning of federal and Texas securities laws and that the plaintiffs are not "consumers" who have acquired "services" within the meaning of the DTPA. See DTPA § 17.45, Tex. Bus. & Com.Code Ann. § 17.45 (Vernon 1987) (defining "consumer" and "services"). The Supreme Court confronted similar arguments in Scherk, ultimately affirming a dismissal without addressing the question of whether the plaintiffs had acquired securities. *Scherk*, 417 U.S. at 514 n. 8, 94 S.Ct. at 2454-55 n. 8. Because, as the Supreme Court did in *Scherk*, we ultimately find the forum selection clause enforceable, we follow the same route here and express no view on the merits of these arguments.

As with the fraud and overreaching claims, the basic framework for analyzing the plaintiffs' Texas and federal public policy arguments is the strong presumption of enforceability established by *The Bremen* and *Scherk*, and the highest hurdle they must overcome to demonstrate "unreasonableness" is *Scherk*. There, the plaintiff alleged violations of § 10(b) of the Exchange Act and attempted to resist enforcement of an arbitration clause on the basis of the act's antiwaiver provision, one of the statutes invoked here. Applying *The Bremen*, the Court rejected this argument and along with it the view that

> only United States laws and United States courts should determine this controversy in the face of a solemn agreement between the parties that such controversies be resolved elsewhere.... To determine that "American standards of fairness" ... must nonetheless govern the controversy demeans the standards of justice elsewhere in the world, and

> unnecessarily exalts the primacy of United States law over the laws of other countries.

Scherk, 417 U.S. at 517 n. 11, 94 S.Ct. at 2456 n. 11. The Court went on to reiterate *The Bremen's* rejection of the "parochial" notion that all disputes in international business transactions "must be resolved under our laws and in our courts," reasoning that "[w]e cannot have trade and commerce in world markets ... exclusively on our terms, governed by our laws and resolved in our courts." *Id.* at 519, 94 S.Ct. at 2457 (quoting *The Bremen*, 407 U.S. at 9, 92 S.Ct. at 1912-13).

More generally, we must tread cautiously before expanding the operation of U.S. securities law in the international arena. The regulatory regime Congress has constructed is "designed to protect American investors and markets," not to stamp out "any fraud that somehow touches the United States." *Robinson v. TCI/US West Communications Inc.*, 117 F.3d 900, 906 (5th Cir.1997). To insist on the application of American securities law where the laws of the parties' agreed-upon forum meet this concern would be the very height of the parochialism that The Bremen condemned. See *The Bremen*, 407 U.S. at 9, 92 S.Ct. at 1912-13.

This is particularly so in the case of England, a forum that American courts repeatedly have recognized to be fair and impartial [20] We have not hesitated to force plaintiffs to litigate their claims of securities fraud in that nation, differences between English and American remedies notwithstanding.[21]

Beginning with the presumption that the FS/COL clause is binding, and recognizing the plaintiffs' "heavy burden of proof" to

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20. *See, e.g., id.* at 12, 92 S.Ct. at 1914; *Riley*, 969 F.2d at 958; Syndicate 420 at *Lloyd's London v. Early Am. Ins. Co.*, 796 F.2d 821, 829 (5th Cir.1986).

21. See *Robinson*, 117 F.3d at 907-09 (affirming referral of securities fraud claims to England on ground of f.n.c.).

overcome this, *The Bremen*, 407 U.S. at 17, 92 S.Ct. at 1917, we thus proceed to consider the plaintiffs' arguments against enforcement of the clause. They initially attempt to distinguish Scherk on the ground that the Names' transactions with Lloyd's were not "international business transactions."

The most charitable adjective with which to describe this argument is "disingenuous." Each of the American plaintiffs signed a series of agreements with English entities and traveled to England as part of the process of becoming a Name. We need not dwell on this contention any further, it being sufficiently obvious that an agreement is "international" when it involves an American Name's underwriting international insurance policies in an English market, pooling resources with other Names from over eighty countries, and all the while explicitly agreeing to be bound by English law.

The plaintiffs also aver that *Scherk* and the Supreme Court's other forum selection cases are distinguishable in that they dealt with forum selection clauses unaccompanied by choice-of-law clauses. The claimed significance of this is that a forum selection clause, in isolation, acts only to deprive the aggrieved party of a "procedural right" to a particular forum, whereas a forum selection clause in combination with a choice-of-law clause impermissibly extinguishes both a "procedural right" and a more important "substantive right" to the remedies afforded by a particular statute or common- law cause of action. The Ninth Circuit placed substantial weight on this distinction, ultimately concluding that the FS/COL clause "require[s] the waiver of substantive provisions of the 1933 and 1934 Acts and [is] consequently void." *Richards*, 107 F.3d at 1428.

Plaintiffs are at least partially wrong in their premise, for *Scherk* involved a foreign forum selection clause accompanied by a choice-of-law clause selecting the law of Illinois. *Scherk*, 417 U.S. at 508, 94 S.Ct. at 2451- 52. Presumably, this meant that the parties could rely on the protections of the federal securities laws as well, but the decision did not rest on this assumption. Instead, the Court roundly rejected the notion that a forum selection clause can be circumvented

by a party's asserting the unavailability of American remedies. *See id.* at 517-19, 94 S.Ct. at 2456-57.

The *Scherk* Court's failure to draw the distinction the plaintiffs urge seems eminently sensible to us, for surely it is obvious that, even in the absence of a choice-of-law clause, enforcement of a foreign forum selection clause frequently will result in the application of foreign law to the dispute. *See Scherk*, 417 U.S. at 519 n. 13, 94 S.Ct. at 2457 n. 13. Choice of law is often one of the reasons for obtaining a forum selection clause. *The Bremen*, 407 U.S. at 13-14 n. 15, 92 S.Ct. at 1915 n. 15.

It cannot be the case that, by virtue of a foreign forum selection clause standing alone, the domestic party to an international business agreement retains a "substantive right" to assert the remedies and protections of American statutes in the contractually agreed-upon forum. The sophisticated individuals entering into these agreements are hardly so naive as to believe that by choosing only a foreign forum and not the law to be applied therein, they thereby retain some inalienable privilege of litigating their disputes under American law.

It is unrealistic to expect a foreign tribunal even to entertain this notion, when faced with parties that have selected the tribunal as their forum. There is nothing talismanic about American law, and certainly nothing that compels foreign courts to "exalt [its] primacy" merely because it provides remedies that their laws do not. *Scherk*, 417 U.S. at 517 n. 11, 94 S.Ct. at 2456 n. 11.

The plaintiffs protest that *Mitsubishi* and *Vimar Seguros* support their theory about combination forum selection/choice-of-law clauses extinguishing substantive rights. It is a strained reading of these decisions that they urge on us, however.

In *Mitsubishi*, 473 U.S. at 640, 105 S.Ct. at 3361, the Court ordered Japanese arbitration of an American automobile dealer's antitrust claims against its franchisor, notwithstanding that the foreign arbitrator might misapply U.S. law. The key to the decision was the

same driving force that was behind *The Bremen* and *Scherk*: "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes...." *Id.* at 629, 105 S.Ct. at 3355 (citing *Scherk*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270). Nonetheless, in dictum, the Court stated that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Id.* at 637 n. 19, 105 S.Ct. at 3359 n. 19. Pointing to this statement, the plaintiffs urge the same conclusion the Ninth Circuit reached in *Richards*, 107 F.3d at 1427, i.e., that the General Undertaking's FS/COL clause should be condemned here.

We do not read *Mitsubishi* so broadly. Setting aside the fact that it is dictum, the quoted statement, by its own terms, is limited to the antitrust context, as is *Mitsubishi* more generally.

This circuit expressly has recognized that " 'the antitrust laws of the United States embody a specific congressional purpose to encourage the bringing of private claims in the American courts in order that the national policy against monopoly may be vindicated.' "[22] Indeed, it is precisely this "crucial point of difference" between antitrust suits and other types of actions, *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 829-30 (5th Cir.1993), that led us to prohibit f.n.c. dismissals in antitrust cases while allowing them in others.[23] Properly read in conjunction with Scherk—a case in which the antiwaiver provisions of the federal securities laws were directly

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22. *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1142- 43 (5th Cir.1989) (quoting *Laker Airways Ltd. v. Pan American World Airways*, 568 F.Supp. 811, 818 (D.D.C.1983)).

23. *See Industrial Inv. Dev. Corp. v. Mitsui & Co.*, 671 F.2d 876, 890-91 (5th Cir.1982), vacated on other grounds, 460 U.S. 1007, 103 S.Ct. 1244, 75 L.Ed.2d 475 (1983).

before the Court—this single sentence from *Mitsubishi* cannot be given the sweeping implications that the plaintiffs and the Ninth Circuit attribute to it.[24]

Vimar Seguros, a case involving the enforceability of forum selection and choice of law clauses under *The Carriage of Goods by Sea Act ("COGSA")*, 46 U.S.C. app. § 1300 *et seq.*, is similarly inapposite. Quoting *Mitsubishi*, the Court there expressed concern that the combination of a forum selection clause and a choice of law clause might deprive the parties of their rights under COGSA, a uniform system of international rules governing carrier and shipper liability. *Vimar Seguros*, 515 U.S. at 540, 115 S.Ct. at 2330 (quoting *Mitsubishi*, 473 U.S. at 637 n. 19, 105 S.Ct. at 3359 n. 19).

But COGSA, unlike the American securities statutes or the Texas laws, is "the culmination of a multilateral effort" to establish such rules, an international scheme the very nature of which would be frustrated by permitting parties to opt out of it. *Id.*, 515 U.S. at 537, 115 S.Ct. at 2328. Because the enforceability doctrine of *The Bremen* and *Scherk* is grounded in the special needs of parties contracting in international commerce, it would make little sense to apply it against a statute specifically designed to foster uniformity in international shipping agreements. *Id.* As the Second Circuit has recognized, application of the usual enforceability rules to COGSA would create an exception that "would swallow the whole." *AVC Nederland*, 740 F.2d at 160.[25]

Our judgment is also informed by the fact that the Supreme Court has never overruled, or indeed even expressly limited, either The Bremen or Scherk. Quite simply, *Scherk* rejected the idea that the antiwaiver provisions of U.S. securities laws bar enforcement of forum

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24. Accord *Shell*, 55 F.3d at 1230-31; *Bonny*, 3 F.3d at 159-61; *Roby*, 996 F.2d at 1364 & n. 3; *Riley*, 969 F.2d at 956-57.

25. Accord *Mitsui*, 111 F.3d at 34 (enforcing combination forum selection clause/choice of law clause choosing COGSA as the applicable law).

selection clauses in international transactions. As *Scherk* is directly on point, we are bound to follow it, regardless of whether we believe (or, as the case may be, do not believe) that later decisions have undermined its rationale.[26]

Haynsworth and Leslie's remaining objections to the enforcement of the FS/COL clause essentially echo the Ninth Circuit's view: "The available English remedies are not adequate substitutes for the firm shields and finely honed swords provided by American securities law." *Richards*, 107 F.3d at 1430. The American system of securities regulation may be the broadest, most comprehensive of all. We refuse to accept the notion, however, that the sheer scope of U.S. securities law automatically renders that of other countries inferior or should provide American investors a means to escape their contractual obligations when they begin to prove too costly.

The view that every foreign forum's remedies must duplicate those available under American law would render all forum selection clauses worthless and would severely hinder Americans' ability to participate in international commerce. We wholeheartedly adopt the Second Circuit's response to the plaintiffs' contention:

> It defies reason to suggest that a plaintiff may circumvent forum selection and arbitration clauses merely by stating claims under laws not recognized by the forum selected in the agreement. A plaintiff simply would have to allege violations of his country's tort law or his country's statutory law or his country's property law in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction. We refuse to allow a party's solemn promise to be defeated by artful pleading.

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26. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989).

Roby, 996 F.2d at 1360 (emphasis in original).[27]

Careful weighing of these considerations leads us to join the majority of courts that have considered this issue in concluding that the antiwaiver provisions of U.S. securities laws do not bar enforcement of the FS/COL clause. The same reasoning compels an identical conclusion as to the antiwaiver provisions of the Texas Securities Act and the DTPA.

[11] As other courts have observed, English law provides a variety of protections for fraud and misrepresentations in securities transactions.[28] As the Allen court recognized, for example, English law permits Names to bring "claims based on the tort of deceit, breach of contract, negligence, and breach of fiduciary duty," with possible "injunctive, declaratory, recissionary, and restitutionary relief." 94 F.3d at 929 (*citing Shell*, 55 F.3d at 1230-31).

Indeed, in some respects English law appears to provide even greater protections ***970** than does U.S. law. *See Roby*, 996 F.2d at 1365 (noting the "low scienter requirements" of English misrepresentation law). The plaintiffs' remedies in England are adequate to protect their interests and the policies behind the statutes at issue.

Having previously enjoyed the benefits of Lloyd's contractual obligations to them, the plaintiffs must now live up to theirs as well. The FS/COL must be enforced, and the plaintiffs as " 'representative[s] of the American business community' " required to " 'honor [their] bargains.' " *Mitsubishi*, 473 U.S. at 640, 105 S.Ct. at 3361 (quoting *Alberto-Culver Co. v. Scherk*, 484 F.2d 611, 620 (7th Cir.1973)

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27. *See also Robinson*, 117 F.3d at 909 (holding that the substantially greater scope of discovery under American law does not bar transfer to England on ground of f.n.c.).

28. *See Allen*, 94 F.3d at 929; *Shell*, 55 F.3d at 1231; *Bonny*, 3 F.3d at 161; *Roby*, 996 F.2d at 1365; *Riley*, 969 F.2d at 958.

(Stevens, J., dissenting), rev'd, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974)). Because the Leslie district court found otherwise, its judgment is reversed and remanded with instructions to dismiss. The Haynsworth district court's judgment of enforceability is affirmed.

IV.

[12] Finally, the Haynsworth plaintiffs claim that the district court erred in dismissing their claims without permitting additional discovery and conducting an evidentiary hearing on the issue of whether the FS/COL clause had been procured by fraud. We find little merit in the discovery claim, particularly given their halfhearted response to the district court's invitation to submit "anything they wanted the court to consider." In large part, the Haynsworth plaintiffs appear to have relied on the record in Leslie, a great deal of which has no direct relevance to their claims.

[13][14] A party seeking a continuance to conduct discovery must demonstrate "both why it is currently unable to present evidence creating a genuine issue of fact and how a continuance would enable the party to present such evidence." *Liquid Drill, Inc. v. U.S. Turnkey Exploration, Inc.*, 48 F.3d 927, 930 (5th Cir.1995). A refusal to grant such a continuance is reviewable for abuse of discretion only. *Id.* A careful review of the record persuades us that this standard has not been met, so we find no error.

The plaintiffs fare no better on their claim that *Moseley v. Electronic & Missile Facilities*, 374 U.S. 167, 83 S.Ct. 1815, 10 L.Ed.2d 818 (1963), required the district court to conduct an evidentiary hearing. In Moseley, the party resisting enforcement of an arbitration clause attacked not only the overall agreement but also the arbitration clause specifically, claiming that it had been procured by fraud. *Id.* at 169, 83 S.Ct. at 1816- 17. The Court, noting that the allegation of fraud went straight to the arbitration clause itself, held that that issue must first be adjudicated at "trial" before the clause could be enforced. *Id.* at 171, 83 S.Ct. at 1817- 18. This is entirely

consistent, of course, with *Prima Paint* and *Scherk's* requirement that fraud must go specifically to a forum selection or arbitration clause in order to bar enforcement.

Here, as in *Moseley*, the plaintiffs claim fraud in the inducement of the FS/COL clause. As we have explained, however, nothing in their more specific allegations supports this claim. At best, what fraud they allege goes only to the 1986 General Undertaking as a whole. Even reading *Moseley* literally, to require a "trial" rather than simply a summary judgment or other proceeding in which the parties are permitted to submit evidence—an interpretation the validity of which we need not and do not reach—the plaintiffs have not met the threshold requirement that their claims go specifically to the clause. The district court properly declined to hold an evidentiary hearing.

V.

Because we find the FS/COL clause of the 1986 General Undertaking enforceable, we need not consider whether the suits should also be dismissed on the ground of f.n.c. For the reasons stated above, we AFFIRM the judgment of dismissal in No. 96-20769 and REVERSE and RENDER a judgment of dismissal in No. 96-20805.

APPENDIX B

Not Reported in F.Supp.
64 USLW 2239
(Cite as: 1995 WL 661090 (S.D.Tex.))

Charles Robert LESLIE, Plaintiff,
v.
LLOYD'S OF LONDON, a/k/a Lloyd's, a/k/a The Corporation of Lloyd's, a/k/a The
Society of Lloyd's, and R.W. Sturge & Co., a/k/a R.W. Sturge Ltd., Defendants.

Civ. A. No. H-90-1907.

United States District Court, S.D. Texas, Houston Division.

Aug. 20, 1995.

ORDER AFFIRMING, AFTER RECONSIDERATION, MAGISTRATE'S MEMORANDUM & RECOMMENDATION

RAINEY, District Judge.

On May 11, 1991, Magistrate Frances H. Stacy delivered two documents, the first styled Memorandum & Recommendation Regarding Lloyd's of London's Motion to Dismiss (Docket entry # 43), the second styled Memorandum & Recommendation Regarding R.W. Sturge & Co.'s Motion to Dismiss for Lack of Jurisdiction Under Rule 12 and Forum Non Conveniens or Alternatively, Motion to Stay Proceedings Pending Arbitration. (Dkt. # 44). On September 4, 1991, the Court, "after a thorough review of the motions[,] responses of [the Defendants] and the rulings of the magistrate," signed an order

affirming the magistrate's memoranda and recommendations. (Dkt. # 49). The Defendants subsequently moved for reconsideration of the Court's order, filing the following documents:[1]

> (1) [Defendant Lloyd's of London's] Motion for Reconsideration of the Court's Memorandum and Order Dated September 4, 1991; Motion for New Trial; Motion for Findings of Fact and Conclusions of Law; and Motion for Interlocutory Appeal in Accordance With 28 U.S.C. § 1292(b). (Dkt. # 50).
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> (2) Defendant R. W. Sturge & Co., Ltd.'s Motion for Reconsideration of Court's Memorandum and Order Dated September 4, 1991; Motion for New Trial; Motion for Findings of Facts and Conclusions of Law; and Motion for Interlocutory Appeal in Accordance With 28 U.S.C. § 1292(b). (Dkt. # 51).
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> (3) Lloyd's of London's Supplemental Motion to Dismiss and Supplemental Motion to Reconsider. (Dkt. # 54).
>
> (4) Defendant R. W. Sturge & Co., Ltd.'s Supplemental Memorandum in Support of its Motion for Reconsideration of Court's Memorandum and Order Dated September 4, 1991, Motion for New Trial, and Motion for Findings of Fact and Conclusions of Law. (Dkt. # 57).
>
> (5) Lloyd's of London's Supplemental Motion to Reconsider. (Dkt. # 64).
>
> (6) Lloyd's of London's Supplemental Motion to Dismiss. (Dkt. # 65).

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1. This list of documents does not include any Lloyd's or Sturge documents filed in response to opposition documents that Plaintiff Robert Leslie filed. Cf. Syndicate 420 at *Lloyd's of London v. Early Am. Ins. Co.*, 796 F.2d 821, 826 (5th Cir.1986) ("Much as Eurystheus imposed the twelve labors upon Hercules, so the E & O Underwriters imposed upon the Court below the Herculean task of resolving a number of exceedingly complex issues in their motions to dismiss.").

(7) Defendant Lloyd's of London's Supplemental Motion to Reconsider. (Dkt. # 70).

(8) Defendant Lloyd's of London's Third Supplemental Motion to Reconsider. (Dkt. # 83).

(9) Defendant R.W. Sturge & Co., Ltd's Second Supplemental Motion for Reconsideration of Court's Memorandum and Order Dated September 4, 1991, Motion for New Trial, and Motion for Findings of Fact and Conclusions of Law. (Dkt. # 90).

Subsequently, Plaintiff Charles R. Leslie ("Leslie") notified the Court of his intent to dismiss Defendant R.W. Sturge & Co. ("Sturge") from this action voluntarily. (Dkt. nos. 85,[2] 86, 108). All motions filed by Sturge still pending before the Court, therefore, should be terminated as MOOT. (Dkt. nos. 51, 57, 90, 105). Before the Court are the various motions and supplemental motions to reconsider and dismiss filed by Defendant Lloyd's of London. ("Lloyd's"). (Dkt. nos. 50, 54, 64, 65, 70, 83). After considering the motions,[3] Plaintiff's responses thereto, all replies by Lloyd's, and the applicable law, the Court is of the opinion that Lloyd's motion to reconsider should be GRANTED, that the memorandum and recommendation of the magistrate should be AFFIRMED upon reconsideration, that Lloyd's motion and supplemental motions to dismiss should be DENIED, that Lloyd's motion for interlocutory appeal should be GRANTED, and that any other motions by Lloyd's should be DENIED.

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2. The stipulation to dismiss claims against Sturge arising from two Outhwaite syndicates was filed pursuant to the settlement agreement in *Stockwell v. R.H.W. Outhwaite (Underwriting Agencies) Limited*, Nos. 89- 2729, 91-1501 (Q.B.Comm'l Ct. filed Dec. 18, 1989) (Eng.). Leslie subsequently dismissed all claims against Sturge, apparently for reasons of litigation strategy.

3. Some of the Lloyd's documents adopt Sturge's arguments by reference. Therefore, the Court will address, as necessary, any arguments adopted by reference.

I. ALLEGATIONS AND FACTUAL BACKGROUND

A. Insurance for long-tall risks—general background on the industry.

Because of developments in liability for latent, long-term risks such as asbestos exposure or environmental pollution,[4] the insurance industry in the last three decades has developed more than a passing interest in the subject. Other chapters in the saga of allocating responsibility for long-tail liability among insurers, insureds, brokers, reinsurers, retrocessionaires, and others include battles involving (1) the shift from occurrence-based liability coverage to claims-made[5] policies,[6]

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4. *See, e.g., In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721 (2nd Cir.1992), modified on reh'g sub nom. *In re Findley*, 993 F.2d 7 (2nd Cir.1993) (Johns-Manville bankruptcy); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C.Cir.1981) (developing "tripple trigger" analysis of insurance coverage for continuing occurrences), cert. denied, 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875 (1982); 42 U.S.C. § 9607 (establishing widespread joint & several liability, with right of contribution, for "Superfund" response costs).

5. In contrast with a "claims-made" policy, an "occurrence" policy provides "long-tail" coverage. A claims-made policy covers only claims made during the policy period for occurrences within a coverage period extending back to a recited retroactive date. *See American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 843 & nn. 3-4 (Tex.1994) (hereafter, "APIE "). While an "occurrence" policyholder need only buy one insurance policy to be covered for occurrences within a particular year, a "claims-made" policyholder ordinarily must purchase subsequent policies from year to year, or a separate "long-tail" policy, in order to obtain extended coverage. *Hartford Fire Ins. Co. v. California*, 509 U.S. ----, ----, 113 S.Ct. 2891, 2896, 125 L.Ed.2d 612, 61 U.S.L.W. 4885 (1993).

6. The United States Supreme Court in *Hartford Fire Ins. Co. v. California*, 509 U.S. ----, ----, 113 S.Ct. 2891, 2911-17, 125 L.Ed.2d 612, 61 U.S.L.W. 4885 (1993) (Insurance Antitrust Litigation), held that allegations by the attorneys general of nineteen states "that the defendants ... conspired in violation of § 1 of the Sherman Act to restrict the terms of coverage of commercial general liability (CGL) insurance available in the United States" from occurrence to claims-made policies, and to impose other changes in available policy terms, *see id.*, 509 U.S. at ----, 113 S.Ct. at 2895-96, 2897-99 ("As a consequence [of encouragement from American insurance companies], many London-based underwriters, syndicates, brokers, and reinsurance companies informed [the Insurance Services Office, Inc.] of their intention to withhold rein-

(2) the definition of "occurrence"[7] and the possibility of "stacking" liability policies,[8] (3) adoption of "sudden and accidental" pollution exclusion clauses,[9] and (4) the subsequent adoption in 1985 of the

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surance ... until ISO incorporated all four desired changes ... into the ISO CGL forms."), stated a claim that fell within the § 3(b) "boycott or coercion" exception to the *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011-1013, which otherwise exempts "the business of insurance" from the antitrust laws. However, the Court's holding was limited to the extent that the only allegations supporting the "boycott" claim were allegations that "primary insurers who wrote on disfavored forms would be refused all reinsurance, even as to risks written on other forms," or of similar threats by reinsurers. *Id.* 509 U.S. at ----, 113 S.Ct. at 2916-17 (emphasis in original); cf. *St. Paul Fire & Marine Ins. Co. v. Berry*, 438 U.S. 531, 98 S.Ct. 2923, 57 L.Ed.2d 932 (1978) (agreement by insurers to force change from "occurrence" to "claims-made" policies constituted a "boycott"). The Supreme Court also rejected the London reinsurers' argument that the District Court should have "declined to exercise ... jurisdiction over them under the principle of international comity." *Hartford Fire Ins. Co.*, 509 U.S. at ----, 113 S.Ct. at 2908- 11. The Insurance Antitrust Litigation has subsequently settled.

7. *See Chemstar, Inc. v. Liberty Mut. Ins. Co.*, 41 F.3d 429, 433-35 (9th Cir.1994) (California law), petition for cert. filed, 63 U.S.L.W. 3598 (U.S. Feb. 2, 1994) (No. 94-1337); *Society of the Roman Catholic Church of the Diocese of Lafayette and Lake Charles v. Interstate Fire & Casualty Co.*, 26 F.3d 1359, 1363-67 (5th Cir.) (Louisiana law), reh'g, en banc, denied, 29 F.3d 626 (5th Cir.1994); *Air Prods. & Chems., Inc. v. Hartford Accident & Indem. Co.*, 25 F.3d 177, 180-82 (3d Cir.1994); *Maryland Casualty Co. v. W.R. Grace & Co.*, 23 F.3d 617, 624-28 (2d Cir.) (New York law), cert. denied, 513 U.S. 1052, 115 S.Ct. 655, 130 L.Ed.2d 559, 63 U.S.L.W. 3438 (1994); *Eljer Mfg., Inc. v. Liberty Mut. Ins. Co.*, 972 F.2d 805, 812 (7th Cir.1992), cert. denied, 507 U.S. 1005, 113 S.Ct. 1646, 123 L.Ed.2d 267, 61 U.S.L.W. 3667 (1993); *Keene Corp. v. Insurance Co. of N. Am.*, 667 F.2d 1034 (D.C.Cir.1981), cert. denied, 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875 (1982); *Commonwealth Lloyd's Ins. Co. v. Cullen/Frost Bank of Dallas*, 889 S.W.2d 266 (Tex.1994) (per curiam); APIE, 876 S.W.2d at 853 n. 20 (collecting cases); *Northern States Power Co. v. Fidelity & Casualty Co. of N.Y.*, 523 N.W.2d 657, 661-64 (Minn.1994); *Sentinel Ins. Co. v. First Ins. Co. of Haw.*, 76 Haw. 277, 875 P.2d 894, modified, 76 Haw. 453, 879 P.2d 558 (1994); *J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 506-07 (Pa.1993); *Continental Casualty Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 650-52, 609 N.E.2d 506, 510-12, 593 N.Y.S.2d 966 (N.Y.1993); *United States Gypsum Co. v. Admiral Ins. Co.*, 643 N.E.2d 1226, 1252-1257 (Ill.App.Ct.1994); *St. Paul Fire & Marine Ins. Co. v. McCormack & Baxter Creosoting Co.*, 126 Or.App. 689, 870 P.2d 260 (Or.Ct.App.), modified, 128 Or.App. 234, 875 P.2d 537 (Or.Ct.App.1994); *Armstrong World Indus. v. Aetna Casualty & Sur. Co.*,

"absolute" pollution exclusion.[10] The present dispute is between what is by far the largest and most influential collection of players in the

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30 Cal.App.4th 1117, 1167-1204, 26 Cal.Rptr.2d 35, 49-74, 62 U.S.L.W. 2372 (Cal.Ct.App.1993), review granted, 866 P.2d 1311, 27 Cal.Rptr.2d 488 (Cal.1994); *Montrose Chem. Corp. of Cal. v. Admiral Ins. Co.*, 30 Cal.App.4th 1474, 1513-22, 5 Cal.Rptr.2d 358 (Cal.Ct.App.1992), review granted, 862 P.2d 661, 24 Cal.Rptr.2d 661 (Cal.1992).

8. Compare *Keene Corp.*, 667 F.2d at 1049-50, and *APIE*, 876 S.W.2d at 852-55 (majority rule), with *Cole v. Celotex Corp.*, 599 So.2d 1058 (La.1992) (minority rule).

9. *See Morton Int'l, Inc. v. General Accident Ins. Co. of Am.*, 134 N.J. 1, 28-80, 629 A.2d 831, 847-76 (1992), cert. denied, 512 U.S. 1245, 114 S.Ct. 2764, 129 L.Ed.2d 878, 62 U.S.L.W. 3861 (1994) ("If applied as written, although interpretative questions undoubtedly would require resolution, the ['sudden and accidental'] clause sharply and dramatically would restrict the coverage that previously had been provided under CGL policies for property damage caused by accidental pollution.... We are fully satisfied that if given literal effect, the standard clause's widespread inclusion in CGL policies would limit coverage for pollution damage to so great an extent that the industry's representation of the standard clause's effect, in its presentation to New Jersey and other state insurance regulatory agencies, would have been grossly misleading. Proffered to regulators merely as a clarification of existing coverage ... the industry's understatement of the clause's actual effect on coverage for pollution damage is both apparent and unjustifiable.... Had full disclosure been made, we would not hesitate to enforce the pollution- exclusion clause as written, resolving nuances inherent in the meaning of "sudden" on a case-by-case basis. Not only did the insurance industry fail to disclose the intended effect of this significant exclusionary clause, it knowingly misstated its intended effect in the industry's submission of the clause to state Departments of Insurance. Having profited form that nondisclosure by maintaining pre-existing rates for substantially-reduced coverage, the industry should be required to bear the burden of its omission...."); *see also Union Pac. Resources Co. v. Aetna Casualty & Sur. Co.*, 894 S.W.2d 401 (Tex.App.--Fort Worth 1994), application for writ of error filed, 38 Tex.Sup.Ct.J. 637 (May 17, 1995) (95-0473).

10. *See Hartford Fire Ins. Co. v. California*, 509 U.S. at ----, 113 S.Ct. at 2896, 2899; *National Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 38 Tex.Sup.Ct.J. 332, 1995 WL 92215, 1995 Tex. LEXIS 17 (Tex. Mar. 2, 1995) (D-4353) (unanimous opinion), motion for rehearing filed April 3, 1995.

London (re)insurance market,[11] the Society of Lloyd's, and an individual American retrocessional underwriter,[12] or "Name," who is a member of the Society of Lloyd's. The Plaintiff, Leslie, alleges that he discovered in the late 1980s that he was the victim of a scheme whereby "insiders" in the Society of Lloyd's concentrated highly undesirable long-tail asbestos and pollution risks in syndicates underwritten primarily by recently recruited "outside" Names from the United States,[13] Canada, Australia, and elsewhere,[14] while the "inside" Names focused their own efforts upon more lucrative syndicates and lines of insurance.

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11. In a 1992 report prepared with assistance from McKinsey & Co., Lloyd's reports, "Lloyd's underwriters underwrite just over half [53%] of all London market business, but more importantly lead more than two thirds [66%] of this business." LLOYD'S OF LONDON, LLOYD'S: A ROUTE FORWARD 46 & Ex. 23 (1992). Based on net reinsurance premiums, Lloyd's reports it was the third-largest reinsurer in the world in 1990; the second-largest if inter-syndicate reinsurance is included. *Id.* at 48 Ex. 25. In 1989, 31,329 individuals worldwide were Names, or members of the Society of Lloyd's, engaged in active underwriting, up from 6,020 in 1971. *See id.* at 26 Ex. 6.; LLOYD'S OF LONDON, 1993 ANNUAL REPORT AND ACCOUNTS 47. In 1993, Lloyd's reported 32,015 total active and inactive Names, down from 34,218 in 1989; the number of active names in 1993 was 19,537, down from 32,433 in 1988. LLOYD'S OF LONDON, A GUIDE TO CORPORATE MEMBERSHIP App. 1, at 47 (1993).

12. See ROBERT H. JERRY, II, UNDERSTANDING INSURANCE LAW 683-84 (Matthew Bender ed. 1987) (explaining the terms "primary insurer," "ceding insurer," "reinsurance," "retrocession," and "retrocessionaire").

13. Notably, what the Supreme Court called "domestic [American] retrocessional reinsurers" were not among the defendants from whom the attorneys general sought relief in *Hartford Fire Ins. Co.*, 509 U.S. at ----, 113 S.Ct. at 2899 & n. 5.

14. See Steve Boggan, Foreigners fared worst in Lloyd's losses, THE INDEPENDENT, Apr. 27, 1992, at A2; Julian Barnes, The Deficit Millionaires, THE NEW YORKER, Sept. 20, 1993 at 74, 84 (noting statistical correlation between geographic distance from 1 Lime Street and losses in Lloyd's syndicates).

B. Nature of the case

When ruling on a motion to dismiss for failure to state a claim, the Court is not concerned with the proof either side has offered, but solely with the plaintiff's allegations.[15] All facts discussed below that are not expressly alleged by the Plaintiff are for the purpose of addressing the forum- selection, choice-of-law, comity, and forum non conveniens issues.[16] Because a lengthy discussion of the Plaintiff's allegations or the Court's prior findings would be superfluous, *see Leslie v. Lloyd's of London*, No. 90-1907, 1994 U.S.Dist. LEXIS 18565 (S.D.Tex. Nov. 2, 1994) (findings of fact and conclusions of law) (Dkt. # 122), this order will provide only a brief description of the structure of Lloyd's and the nature of Leslie's claims against it.

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15. A complaint is subject to dismissal if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Lujan v. Defenders of Wildlife*, 504 U.S. ----, ----, 112 S.Ct. 2130, 2137, 119 L.Ed.2d 351 (1992); *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984). The Court must accept all well-pleaded allegations as true, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 113 S.Ct. 2891, 2895, 125 L.Ed.2d 612 (1993); *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807, 810, 127 L.Ed.2d 114 (1992), and view them in the light most favorable to the plaintiff. *Shultea v. Wood*, 27 F.3d 1112, 1115 (5th Cir.1994), modified on reh'g en banc, 47 F.3d 1427 (5th Cir.1995) (en banc).

16. The parties have subsequently submitted affidavits and live proof in the course of this proceeding. Rule 12(b) does provide, "[i]f, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim ... matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as a motion for summary judgment...." Fed.R.Civ.P. 12(b). However, the Court currently has before it a motion to reconsider an order adopting a magistrate's recommendation to deny the Defendants' 12(b)(6) motions. It would be extraordinarily awkward, to say the least, at this juncture to convert the motion to reconsider into a motion for summary judgment. Moreover, the Court is of the opinion that the Plaintiff would be entitled to further discovery before the Court could appropriately rule on a motion for summary judgment. Fed.R.Civ.P. 56(f). Therefore, the Court shall confine its 12(b)(6) analysis to the Plaintiff's allegations in the various pleadings filed in this consolidated action, without deciding whether the Plaintiff has introduced legally sufficient evidence to support the allegations.

The Society of Lloyd's is a private entity created by statute, whose members underwrite insurance.[17] Its organization bears little similarity to the corporations that sell insurance in the United States.[18] *But see Crum & Forster, Inc. v. Monsanto Co.*, 887 S.W.2d 103, 148-49 (Tex.App.— Texarkana 1994), application for writ of error filed, 38 Tex.Sup.Ct.J. 46 (Oct. 27, 1994) (No. 94-1088). Only a member of the Society of Lloyd's, a Name, may participate in underwriting Lloyd's policies. Only individuals, not corporations or limited partnerships,

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17. *See generally Edinburgh Assurance Co. v. R.L. Burns Corp.* 479 F.Supp. 138, 144-46 (C.D.Cal.1979) (describing the customary practices of the Lloyd's insurance market).

The Court considers unpersuasive any characterization of Lloyd's as roughly similar to the New York Stock Exchange ("NYSE"), because this analogy ignores dramatic differences between the two institutions. *See contra Bonny v. Society of Lloyd's*, 3 F.3d 156, 158 n. 2 (7th Cir.1993), cert. denied, 510 U.S. 1113, 114 S.Ct. 1057, 127 L.Ed.2d 378, 62 U.S.L.W. 3544 (1994); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1357 (2d Cir.1993), cert. denied, 510 U.S. 945, 114 S.Ct. 385, 126 L.Ed.2d 333, 62 U.S.L.W. 317 (1993). First, Lloyd's has greater similarity to a private club than it does to a public stock exchange. Virtually anyone in the world may buy and sell securities listed on the NYSE, except, for example, certain nationals of foreign states subject to sanctions under the International Emergency Economic Powers Act or the Trading With The Enemy Act. In contrast, the opportunity to participate in Lloyd's underwriting syndicates is strictly limited to approximately 30,000 individuals who have applied for and qualified as "Names." More importantly, business conducted on the NYSE, whether by United States citizens or by foreign nationals, is subject to comprehensive regulation by an independent government agency with extensive enforcement authority. In contrast, the government of England has elected not to regulate the Lloyd's insurance market. *See Lloyd's Act*, 1982 (Eng.). Except to the extent Lloyd's or its syndicates issue or sell securities, insurance, and services abroad, the Lloyd's insurance market, at least in theory, is largely self-regulating.

18. Applying Texas law to a "Lloyd's plan" organization, which "is not a corporation but is controlled by its own underwriters and maintains its own directors, officers, bylaws, books and records, and assets and liabilities," the Crum & Forster court held for purposes of "disregarding the corporate fiction," that "such organizations have a legal status that it much more in the nature of corporate entities and should be regarded as insurance corporations." *Crum & Forster, Inc.*, 887 S.W.2d at 149.

may become Names.[19] Names do not generally underwrite insurance alone; rather, they combine into syndicates, which collectively underwrite risks and take advantage of greater risk- spreading than individual Names could achieve alone. To become a Name, one must pledge to undertake unlimited personal liability for his or her share of any losses. Every Name also pays an initial entrance fee of £PoundsSterling£ 1900 pounds and annual subscription fees of £PoundsSterling£ 365 pounds to the Society of Lloyd's in exchange for various services that are necessary for the operation of the Lloyd's insurance market. In addition, Names pay fees and commissions to their Members' and Managing Agents. Although Names are liable for their proportional share of the risks underwritten by the syndicates they have joined, they are not liable for the share of risks borne by other Names, or by other syndicates. Lloyd's has historically observed a policy of several, not joint, liability for losses—"each for his own part and none for the other." Policy premiums collected as a result of each syndicate's underwriting activities, after losses and loss reserves, generate profits which are distributed to Names in proportion to the share of any syndicate each Name has underwritten.

In the usual course of events, accounting for Lloyd's syndicates takes place in three-year cycles. An account year commences every year and each account year concludes three years later. At the end of a three-year cycle, a syndicate may still have policies with outstanding risks. Generally, the syndicate will close an account year through a process called "reinsurance to close." The outstanding risks are then borne by the Names of the reinsuring syndicate, who accepted the

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19. This statement is only true for the time period in which Leslie participated in underwriting at Lloyd's. Lloyd's 1993 Annual Report states, "The business plan, published in April 1993, set out a programme of profound change for all sectors of the Society. In essence, the plan promoted three significant structural changes: strong central direction of the market; a widening of the capital base to include corporate membership; and reinsuring the 1985 and prior liabilities of members into a new vehicle, NewCo." LLOYD'S OF LONDON, 1993 ANNUAL REPORT AND ACCOUNTS 7-8 (emphasis added) (NewCo is now called Equitas). In the last year, Lloyd's has started admitting corporate (i.e. limited liability) members.

reinsurance premium, while any ceding Names who closed their account year (and therefore paid a loss in the amount of the reinsurance premium) are free from the liability they have ceded and may continue to underwrite future account years of the ceding syndicate, or to resign and underwrite elsewhere. Rarely are the risks of a Lloyd's syndicate ceded to entities outside the Society of Lloyd's.[20]

Lloyd's syndicates are not democratic. Rather, a syndicate is underwritten primarily by passive names, while an Active Underwriter will generally employ, or act as, a Managing Agent. The Managing Agent of a syndicate, subject to the supervision of the Active Underwriter, directs the syndicate's underwriting activity. The Managing Agent for some of Leslie's syndicates, Sturge, also happened to be Leslie's Members' Agent. Members' Agents introduce new Names to Lloyd's and assist Names in joining syndicates.

As Lloyd's states in materials filed with the Court, "[T]he underwriting member is a completely passive participant in the underwriting activity of the syndicates.... Members, as passive participants in the underwriting process, put their faith and assets behind the efforts of their members' agents and the underwriting decisions of the active underwriter. The members, therefore, are not permitted an active role in the day-to-day business of insuring risks or handling claims." See Dkt. # 5, at 10-11 (emphasis added).

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20. However, Lloyd's has created a limited-liability corporate entity within Lloyd's, Equitas, to reinsure pre-1986 pollution and asbestos policies. While the entity was under consideration, it was called NewCo. In the Lloyd's 1993 Annual Report, Chairman Peter Rowland states:

We set ourselves to creating, by the end of 1995, the largest reinsurance/run-off company the world has ever seen.... I am very confident that NewCo will succeed in offering Names an exit route from Lloyd's in respect of their pre-1986 liabilities.

LLOYD'S OF LONDON, 1993 ANNUAL REPORT AND ACCOUNTS at 8-9.

Through the collective efforts of Names' organizations, some comparative information has become available in recent years[21] concerning the periodic profits or losses generated by various Lloyd's syndicates. However, during the 1970s and 1980s, the Lloyd's syndicates did not employ any public disclosure or reporting practices even remotely approaching the requirements imposed upon public companies, investment advisors, or mutual funds in the United States. As a general matter, passive names such as Leslie relied almost completely upon the underwriting experience and training of syndicates' Managing Agents, without themselves having much involvement in or knowledge of syndicate underwriting practices.

Leslie alleges that Charles Parnell, acting on behalf of the Society of Lloyd's came to Texas and recruited him to become a Name in 1977. Parnell was a director for Sturge, both a Members' Agent and the Managing Agent for several syndicates.[22] At the time Parnell contacted Leslie, Lloyd's insiders were already well aware of the mounting potential for losses from asbestos and pollution liability insurance.[23] Representations made to Leslie in Texas before he joined

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21. At the time Leslie applied, Lloyd's did not even publish a list of underwriting agents:

> Whilst a list of Underwriting Agents is not published, the Membership Department at Lloyd's can confirm to potential candidates whether a specific person, firm or company is on the list of agents.

Glossary of Terms, in NOTES FOR APPLICANTS FOR UNDERWRITING MEMBERSHIP ISSUED BY THE COMMITTEE OF LLOYD'S.

22. As mentioned above, Names are generally introduced to Lloyd's through Members' Agents.

23. Insiders at Lloyd's had been cognizant of asbestos risks at least as early as 1969, see Dkt. # 122, at ¶ 11, yet did not disclose the Cromer Report to outside Names until October 1986, after Leslie had executed the General Undertaking containing the contested forum selection clause. Incidentally, about this time, entities participating in the American insurance industry were actively misrepresenting the intended effect of "sudden and accidental" pollution-exclusion clauses to insurance regulators. *Morton Int'l, Inc.*, 134 N.J. at 32-43, 629 A.2d at 849-55.

Lloyd's included the claims that membership in Lloyd's was a safe and attractive investment, that Leslie's underwriting involvement would be focused on low-risk insurance, and that his exposure was limited because after he had participated as an underwriting member in an account year of a particular syndicate for a period of three years, he would be able to resign his underwriting membership in that syndicate at any time by following the notice procedure. See Dkt. # 89, at 5-6. Leslie was also led to believe that the maximum annual loss he could ever expect from a syndicate was approximately equivalent to the long-term average of annual profits, around 10% of his undertaking, and that gains would far exceed losses in the long run, as they have for Lloyd's Names for 300 years.

In 1982, the English Parliament passed the Lloyd's Act, which altered the regulatory structure of Lloyd's and included a provision granting Lloyd's qualified immunity to civil liability from suits by Names in English courts. Lloyd's Act, 1982, ch. 14 (Eng.).

Leslie alleges that several syndicates closed the 1979 accounting year in 1982, despite a letter from auditor Neville Russel, unknown to the passive names, recommending that many syndicates should not close that year because of unquantifiable liability from asbestos. Subsequently, in 1986, Leslie alleges Lloyd's induced him to sign a new General Undertaking containing forum- selection and choice-of-law clauses. These clauses, if enforced, require claims "arising out of or related to" Leslie's membership in Lloyd's to be resolved in England, under English law. In March and June 1986, Sturge informed Leslie that the Lloyd's Act and subsequent regulatory changes by the Council of Lloyd's had "required us, in common with all Lloyd's agents to reformalise (and in some cases may require us to modify)[24] all your underwriting arrangements at Lloyd's over the next

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24. The Court has not discovered in the Lloyd's Act any requirement that claims by or against Names related to their membership in the Society of Lloyd's must be brought in English courts, solely under English law.

few months."[25] While the letters indicated that documents Leslie would sign contained "few variations of substance," any mention of the forum-selection and choice-of-law clauses was conspicuously absent from the notices Leslie received. Lloyd's and its agents never undertook to explain to Leslie the intended effect of these clauses on lawsuits that Lloyd's anticipated its American Names would soon file against it. The notices emphasized that "all Names are required to enter into [the revised General Undertaking] as a condition of continuing membership...."[26] Because Leslie was involved in ongoing underwriting syndicates, he further believed that Lloyd's would call an irrevocable letter of credit that he had posted with Texas Commerce Bank if he terminated his participation as an underwriting member by failing to sign the General Undertaking.[27]

Not long after Leslie executed the 1986 General Undertaking, he learned he would have been better off if he had stopped underwriting. Initially, Leslie learned that several syndicates he had underwritten would not close as planned. Although four account years for syndicates he had underwritten had not closed properly at the time

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25. Letter from Peter Rawlins, Managing Director, R.W. Sturge & Co., to Charles Leslie 1 (Mar. 10, 1986).

26. Letter from K.J. Leonard, R.W. Sturge & Co., to Charles Leslie 2 (June 23, 1986); see also Letter from Peter Rawlins, Managing Director, R.W. Sturge & Co., to Charles Leslie 4 (Mar. 10, 1986) "[T]he Council [of Lloyd's] approved modifications in the terms of [the revised Premiums Trust Deed and General Undertaking] and all Names are now required to accede to them in their revised form as a condition of their continuing underwriting membership...."

27. Cf. Letter from Peter Rawlins, Managing Director, R.W. Sturge & Co., to Charles Leslie 3 (Mar. 10, 1986) ("The Council of Lloyd's has advised agents ... that all names will be required to come into line with the current requirements for means and deposits....").

he signed the General Undertaking, and he had incurred some losses,[28] he was not at that time remotely aware of the scope of Lloyd's problems, or of the likelihood that his liabilities on those syndicates would continue in perpetuity. In 1989, Leslie learned that he could not limit his liability for these open syndicates' losses by resigning from them. Leslie also alleges he learned after 1986 that asbestos and pollution risks had been concentrated in syndicates underwritten by himself and other passive outside Names.[29] As the Court understands his allegations, these syndicates had taken on long-tail risks in the early- and mid-1980s from profitable "inside" syndicates, and/or underwritten new long-tail risks that the "inside" syndicates did not, without collecting (re)insurance premiums sufficient to cover the risks. In short, Leslie discovered he was on the receiving end of a high-stakes game of hot-potato.[30] By the time he learned what had happened it was not feasible to cede the unquantifiable risk back to the insiders.

Leslie makes three claims against Lloyd's:[31] breach of fiduciary duties, deceptive acts or practices in violation of the Texas Deceptive Trade Practices—Consumer Protection Act, Tex.Bus. & Com.Code Ann. §§ 17.41-17.63 (Vernon 1987 & Supp.1995) ("DTPA"), and

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28. See Dkt. # 89, at ¶ 16. Leslie's pleadings also indicate that most of his syndicates and account years continued to pay profits up to the time he signed the General Undertaking. In other papers Leslie has filed with the Court, Leslie claims that appropriate underwriting and accounting practices would have required these syndicates to accumulate significantly greater reserves to cover future losses, rather than paying temporary "profits" which would be called back later as losses on open or reopened accounting years. See Dkt. # 117, at 20, ¶ 35.

29. See Dkt. # 81, at ¶ 23; Dkt. # 89, at ¶¶ 15, 27.

30. The four apparent options available to a Name in the position Leslie alleges he was in were: (1) paying the losses and, in the event of insolvency, declaring bankruptcy, (2) if possible, buying reinsurance from "insiders" or existing Lloyd's syndicates, for a premium equal to or greater than the discounted present value of expected future losses, (3) recruiting new "outsiders" with sufficient capacity to reinsure his risks, and reinsuring to them, or (4) if possible, reinsuring to NewCo/Equitas (i.e. paying a similar premium as would be paid to "insiders," or treating policyholders as "outsiders," as the case may be).

31. The Court has not at this time granted Leslie's motion for leave to file his second amended complaint.

securities fraud, in violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, and Rule 10b-5 promulgated thereunder.[32] *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 9-12 & n. 9, 92 S.Ct. 165, 167-69 & n. 9, 30 L.Ed.2d 128 (1971). Leslie has not pleaded a claim for sale of an unregistered security, or sale of a security by means of a false or incomplete pros-pectus, under section 12(1) or 12(2) of the 1933 Securities Act. 15 U.S.C. § 771; *see generally Gustafson v. Alloyd Co., Inc.*, —U.S.—,—, 115 S.Ct. 1061, 1079-83, 131 L.Ed.2d 1, 63 U.S.L.W. 4165 (1995) (Ginsberg, J., dissenting) (addressing recent change in scope of the section 12(2) rescission remedy). Nor does he allege a civil racke-teering claim under Title XI of the Organized Crime Control Act of 1970, commonly known as the Racketeer Influenced and Corrupt Organizations Act.[33] 18 U.S.C. § 1964(c) ("RICO").

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32. It shall unlawful for any person, directly or indirectly ...
(1) to employ any device, scheme, or artifice to defraud, or
(2) to make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances ... not misleading, or
(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.
17 C.F.R. part 240.10b-5 (emphasis added). Section 10(b) applies not only to "any security registered on a national securities exchange," but also to "any security not so registered." 15 U.S.C. § 78j(b). The scope of Rule 10b-5 does not exceed the scope of Rule 10(b), and a violation must involve some form of manipulative or deceptive device or contrivance. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 473-74, 97 S.Ct. 1292, 1301, 51 L.Ed.2d 480 (1977).

33. *See generally Alfadda v. Fenn*, 935 F.2d 475, 479-80 (2d Cir.1991), cert. denied, 502 U.S. 1005, 112 S.Ct. 638 (1991); *United States v. Noriega*, 746 F.Supp. 1506, 1516-19 (S.D.Fla.1990) ("Section 1962(c) makes it unlawful for 'any person associated with any enterprise engaged in, or the activities of which affect, interstate, or foreign commerce, to conduct or participate ... in the conduct of such enterprise's affairs through a pattern of racketeering activity ..." 18 U.S.C. § 1962(c) (emphasis added).... These prohibitions are on their face all- inclusive.... Indeed, if any statute reaches far and wide, it is RICO."); Kristen Neller, Note, Extraterritorial Application of RICO: Protecting U.S. Markets in a Global Economy, 14 MICH.J.INT'L L. 357, 377-82 (1993); Jonathan Turley, "When in Rome:" Multinational Misconduct and the Presumption Against Extraterritoriality, 84 Nw.U.L.Rev. 598, 601 (1990).

II. SUPPLEMENTAL MOTIONS TO DISMISS

At the outset, the Court notes that Lloyd's has filed a series of motions potentially dispositive of Leslie's section 10(b)/Rule 10b-5 securities fraud claim. Lloyd's position is based upon the watershed case of *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991). According to a case the Supreme Court decided on June 20, 1991, the same day as *Lampf, James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), Lampf applied retroactively to time-bar all securities fraud claims based on the implied 10b- 5 cause of action that were filed within applicable borrowed state limitations periods, but not within the newly announced uniform federal limitations period.

Lloyd's argument that Leslie's claim is time-barred is mistaken. The Lampf decision does not bar Leslie's claim because Congress subsequently decided Lampf does not apply to lawsuits, such as this one, filed before Lampf was handed down. 15 U.S.C. § 78aa-1(a). Although Lloyd's directs the Court to a multitude of cases suggesting that section 27A of the 1934 Act, 15 U.S.C. § 78aa-1, is unconstitutional, the Supreme Court recently affirmed the decision of the Fifth Circuit that section 27A(b) is not unconstitutional. *Pacific Mut. Life Ins. Co. v. First Republicbank Corp.*, 997 F.2d 39 (5th Cir.1993), aff'd sub nom. *Morgan Stanley & Co. v. Pacific Mut. Life Ins. Co.*, 511 U.S. 658, 114 S.Ct. 1827, 128 L.Ed.2d 654, 62 U.S.L.W. 4396 (1994) (per curiam) (evenly divided court), reh'g denied, 114 S.Ct. 2774, 129 L.Ed.2d 887, 62 U.S.L.W. 3862 (1994); *but see BDO Seidman v. Simmons*, — U.S. ——, 115 S.Ct. 1789, 131 L.Ed.2d 718, 63 U.S.L.W. 3771 (1995) (connected case); *Pacific Mut. Life Ins. Co. v. First Republicbank Corp.*, 53 F.3d 1409 (5th Cir.1995) (per curiam). Although the Supreme Court has subsequently held that section 27A(b) violates the separation of powers between Congress and the Judiciary insofar as it purports to require the courts to reopen judgments that have become final, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S.Ct. 1447, 1456-58, 1463, 131 L.Ed.2d 328, 63 U.S.L.W. 4243 (1995), this case has remained pending throughout the Lampf controversy and has never been dismissed on limitations grounds. The circuit courts of

appeal have uniformly upheld the constitutionality of section 27A(a), which is applicable in this case. *See Plaut*, 514 U.S. at ——, 114 S.Ct. at 1469 n. 6 (Stevens, J., dissenting) (collecting cases).

Nor does section 27A(a) represent a mere codification of the uniform limitations period announced in Lampf. The term "laws applicable in the jurisdiction," used in section 27A, refers to borrowed state limitations periods, without regard to the fact that Lampf, technically, announced not only what the law was in every jurisdiction but what the law had been previously. As Justice Scalia recognized:

> But respondents' argument confuses the question of what the law in fact was on June 19, 1991, with the distinct question of what § 27A means by its reference to what the law was. We think it entirely clear that it does not mean the law enunciated in Lampf, for two independent reasons.... [First,] if the statute referred to [Lampf,] its reference to the "laws applicable in the jurisdiction " (emphasis added) would be quite inexplicable. Second, if the statute refers to the law enunciated in Lampf it is utterly without effect, a result to be avoided if possible.

Plaut, 514 U.S. at ——, 115 S.Ct. at 1451-52. Therefore, the Court must eschew a too-literal application of the statutory language and apply section 27A(a) as Congress evidently meant it to apply. *Id.* Leslie's securities fraud claims should not be dismissed on limitations grounds.

III. MOTION FOR REHEARING

Lloyd's has moved for a rehearing of the previous order affirming the magistrate's memoranda and recommendations. In its motion, Lloyd's correctly points out that the previous order recited that it would apply a "clearly erroneous" standard of review to "the Magistrate's actions." While this standard of review is appropriate for the magistrate's rulings on nondispositive matters, it is not the appropriate standard of review for dispositive motions, injunctions,

and the like.[34] Fed.R.Civ.P. 72(b); 28 U.S.C. § 636(b)(1)(B), (C) ("A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made."). Although the Court in fact conducted a thorough, *de novo* review of the magistrate's recommendations concerning the Defendants' dispositive motions, *see generally United States v. Wilson*, 864 F.2d 1219, 1221-22 (5th Cir.1989) (*citing Aluminum Co. of Am. v. E.P.A.*, 663 F.2d 502 (4th Cir.1981)), the order it signed employed standard language concerning district court review of magistrates' routine pretrial decisions, see 42 U.S.C. § 636(b)(1)(A), and inadvertently omitted any mention of the distinction between dispositive and nondispositive motions.

Nevertheless, the Court is of the opinion that reconsideration of the magistrate's memorandum and recommendation is in order. This is particularly so in light of opinions Lloyd's has brought to the Court's attention, which have elected to enforce forum-selection and choice-of-law clauses against Lloyd's Names residing in the United States.[35] Lloyd's motion for rehearing is therefore GRANTED.

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34. The magistrate's recommendation concerning Sturge's motion for referral to arbitration was subject to de novo review by this Court and would have been reviewed under the same standard by the court of appeals. *In re Hornbeck Offshore Corp.*, 981 F.2d 752, 754 (5th Cir.1993); *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5th Cir.1990). Of course, the Court is not required to reconsider the magistrate's recommendation not to refer this matter to arbitration because Sturge is no longer a party to this lawsuit.

35. The Court is therefore cognizant of the following decisions: *Hirsch v. Oakely Vaughn Underwriting, Ltd.*, C.A. No. H-87-3727 (S.D.Tex. Dec. 14, 1988) (decided on forum non conveniens grounds; does not address any forum-selection or choice-of law issue), aff'd, 904 F.2d 704 (5th Cir. May 31, 1990) (No. 89-2563), cert. denied, 498 U.S. 981, 111 S.Ct. 511, 112 L.Ed.2d 523 (1990); *Riley v. Kingsley Underwriting Agencies, Ltd.*, No. 91-C-1411 (D.Colo. Aug. 30, 1991), aff'd, 969 F.2d 953 (10th Cir.1992), cert. denied, 506 U.S. 1021, 113 S.Ct. 658, 121 L.Ed.2d 584 (1992); *Bonny v. The Society of Lloyd's*, 784 F.Supp. 1350 (N.D.Ill. May 29, 1992), aff'd, 3 F.3d 156 (7th Cir.1993), cert. denied, 510 U.S. 1113, 114 S.Ct. 1057, 127 L.Ed.2d

IV. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Lloyd's initial criticism of the magistrate's memorandum and recommendation is that the magistrate "ignored the voluminous documentation, as well as affidavit testimony, provided by [the Defendants] in support of their motions to dismiss," and "merely adopted the Plaintiff's pleadings as true." Dkt. # 45, at 2. Because the magistrate only recited this standard as she ruled on Lloyd's Rule 12(b)(6) motion to dismiss for failure to state a claim, perhaps Lloyd's can forgive the magistrate for following the law. *See supra* note 15; Hartford Fire Ins. Co., — U.S. at ——, 113 S.Ct. at 2895; Albright, — U.S. at ——, 114 S.Ct. at 810 (court accepts well-pleaded allegations as true); Lujan, 504 U.S. at ——, 112 S.Ct. at 2137; Hishon, 467 U.S. at 73, 104 S.Ct. at 2232 (claim is subject to dismissal only if it appears beyond doubt that plaintiff can prove no set of facts in support of claims that would entitle him to relief). The Court shall therefore consider de novo whether Leslie has stated a claim under Rule 10b-5 or the DTPA.

378, 62 U.S.L.W. 3544 (1994); *Roby v. Corporation of Lloyd's*, No. 91-Civ-7081 (MEL) (S.D.N.Y. Aug. 18, 1992), aff'd, 996 F.2d 1353, 1362 (2d Cir.1993), cert. denied, 510 U.S. 945, 114 S.Ct. 385, 126 L.Ed.2d 333, 62 U.S.L.W. 317 (1993); *Shell v. R.W. Sturge, Ltd.*, 850 F.Supp. 620 (S.D.Ohio 1993), aff'd, 55 F.3d 1227 (6th Cir.1995); *Richards v. Lloyd's of London*, C.A. No. 94-1211-IEG (POR), 1995 WL 465687, 1995 U.S.Dist. LEXIS 6888 (S.D.Cal. Apr. 28, 1995); *McDade v. NationsBank of Texas*, N.A., C.A. No. H-94-3714 (S.D.Tex. June 26, 1995). Lloyd's also cites *Ash v. Corporation of Lloyd's*, Nos. C12100 & C9113 (Ont.Ct.App. July 28, 1992) (Can.).

The Court is also aware of reports that some Names have litigated these issues successfully in other jurisdictions, such as Australia and Canada. See Steve Boggan, Foreigners fared worst in Lloyd's losses, THE INDEPENDENT, Apr. 27, 1992, at A2.

A. Deceptive Trade Practices Act

Texas consumers are entitled to rely upon a novel statute that has revolutionized tort law in their state and expanded the available remedies.[36] "The DTPA does not represent a codification of the common law. A primary purpose of the enactment of the DTPA is to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit."[37] *Bank One, Texas,*

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36. *See, e.g., Sorokolit v. Rhodes*, 889 S.W.2d 239, 241-42 (Tex.1994) (recognizing claims against a physician for breast augmentation surgery, based upon knowing misrepresentation and breach of an express warranty, while leaving open the issue of an "implied warranty to perform [medical] services in a good and workmanlike manner."); *Archibald v. Act III Arabians*, 755 S.W.2d 84, 86 (Tex.1988) (converting negligence claim into a treble-damages-and-attorneys'-fees DTPA claim by recognizing an "implied warranty of good and workmanlike performance that applies to horse training services"); *Vail v. Texas Farm Bureau Mut. Ins. Co.*, 754 S.W.2d 129, 131-37 (Tex.1987) (insurance law); *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex.1987) (holding "that an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner is available to consumers suing under the DTPA"); *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 706-08 (Tex.1983) (lender liability for wrongful foreclosure); *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168, 169 (Tex.1983) (liability for builders); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 539-41 (Tex.1981); *Segura v. Abbott Labs., Inc.*, 873 S.W.2d 399 (Tex.App.--Austin 1994) (recognizing a DTPA cause of action by indirect purchasers for cartel behavior, which federal antitrust laws will not permit after *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977)), writ granted, 38 Tex.Sup.Ct.J. 49-50 (Nov. 3, 1994) (94-0514); *Rickey v. Houston Health Club, Inc.*, 863 S.W.2d 148 (Tex.App.-- Texarkana, 1993) (recognizing a warranty or misrepresentation cause of action under the DTPA for a slip-and-fall injury in a health club), writ denied, 888 S.W.2d 812 (Tex.1994); *Berry Property Management Co. v. Bliskey*, 850 S.W.2d 644 (Tex.App.--Corpus Christi 1993, writ dism'd) (DTPA claim against apartment manager by rape victim); *Prudential Ins. Co. of Am. v. Jefferson Assoc.*, 839 S.W.2d 866 (Tex.App.--Austin 1992), rev'd, 38 Tex.Sup.Ct.J. 366 (Mar. 16, 1995) (D-3906).

37. The principles applicable to construing the DTPA place primary emphasis on the intent of the legislature, "keeping in view 'the old law, the evil, and the remedy.'" *Pennington v. Singleton*, 606 S.W.2d 682, 686 (Tex.1980) (citing *Woods v. Littleton*, 554 S.W.2d 662 (Tex.1977)).

N.A. v. Taylor, 970 F.2d 16, 28 (5th Cir.1992); *Eagle Properties Ltd. v. Scharbauer*, 807 S.W.2d 714, 724 (Tex.1990); *Alvarado v. Bolton*, 749 S.W.2d 47, 48 (Tex.1988); *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex.1980) (emphasis added). Most important to this case, the DTPA does away with any common-law requirement of contractual privity. *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 352 (Tex.1987); *Kennedy v. Sale*, 689 S.W.2d 890, 892 (Tex.1985); *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705, 707 (Tex.1983); *Gupta v. Ritter Homes, Inc.*, 646 S.W.2d 168, 169 (Tex.1983); *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540-41 (Tex.1981) ("The Act is designed to protect consumers from any deceptive trade practice made in connection with any purchase or sale of any goods or services."); *Barrett v. U.S. Brass Corp.*, 864 S.W.2d 606, 620-21 (Tex.App.—Houston [1st Dist.] 1993, writ granted); *Knowlton v. U.S. Brass Corp.*, 864 S.W.2d 585, 592-94 (Tex.App.—Houston [1st Dist.] 1993, writ granted) ("To recover under the DTPA, a plaintiff must establish [1] that he is a 'consumer,' [2] that there were false, misleading, or deceptive acts or an unconscionable act, and [3] that the act or acts constituted the producing cause of damage."); cf. *Melody Home Mfg. Co.*, 741 S.W.2d at 352 ("The absence of a cash transfer is not determinative because DTPA plaintiffs establish their standing as consumers by their relationship to a transaction, not by their contractual relationship with the defendant.").

The definition of "consumer" under the DTPA is quite broad: "an individual ... who seeks or acquires by purchase or lease, any goods or services." Tex.Bus. & Com.Code Ann. § 17.45(4) (Vernon 1987) (emphasis added). Lloyd's does not contend that Leslie is a "business consumer" with personal assets of $25 million or more, or "owned or controlled by a corporation or entity" that is similarly capitalized. *See id.* Leslie alleges, and Lloyd's does not contest, that he paid Lloyd's a one-time joining fee and annual membership fees, in exchange for services. Leslie alleges that these included the services necessary to provide an operating insurance market and that Lloyd's represented on several occasions that it provided regulatory and oversight services for its members with respect to the activities of Active Underwriters, Managing Agents, and Members' Agents. Without question, Leslie

alleges a transfer of consideration for services. *Kennedy*, 698 S.W.2d at 892. Moreover, the services Leslie purchased, or the absence thereof, "form the basis" of Leslie's complaint. *Knowlton*, 864 S.W.2d at 592.

Leslie alleges that Lloyd's, either directly or through the actual or apparent authority vested in Parnell and Sturge, made the following misrepresentations, among others:

> (1) that an underwriting member becomes a member of Lloyd's, not some unknown underwriting agency, and the member can rely upon all of the representations made by Lloyd's or its various agents;
>
> (2) that a member's risk, despite nominally unlimited liability, is minimal because Lloyd's tightly regulates its insurance market and oversees all risks to assure that risks are spread throughout the Lloyd's membership, not concentrated in particular syndicates;
>
> (3) that an underwriting member of Lloyd's can expect to earn approximately ten percent (10%) of his or her total underwriting undertaking in profits each year.

Moreover, the allegations in the pleadings indicate that Lloyd's knew about, but failed to disclose, both the risks associated with long-tail asbestos and pollution policies and the Lloyd's insiders' practice of concentrating these risks in "outside" syndicates. Leslie further alleges that these misrepresentations and nondisclosures, including representations concerning regulation and oversight services, constituted deceptive acts or practices which were the producing cause of damages to him and violated one or more of the provisions of the DTPA "laundry list," including the following:

> (2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of ... services;

> (3) causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;
>
> (5) representing that ... services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection he does not;
>
> (7) representing that ... services are of a particular standard, quality, or grade ... if they are of another;
>
> (12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;
>
> (23) the failure to disclose information concerning ... services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

Tex.Bus. & Com.Code Ann. §§ 17.46(a)(2), (3), (5), (7), (12), (23), 17.50(a)(1) (Vernon 1987 & Supp.1995). The allegations would also seem to support a claim for "an act or practice which, to a person's detriment:

> (A) takes advantage of the lack of knowledge, ability, experience, or capacity of a person to a grossly unfair degree; or
>
> (B) results in a gross disparity between the value received and consideration paid, in a transfer involving transfer of consideration."

Id. §§ 17.45(5), 17.50(a)(3) (definition of "unconscionable action or course of action"). A consumer's DTPA rights, of course, may not be waived except under very limited circumstances. *Id.* § 17.42 (waiver

enforceable only if defendant pleads and proves (1) no significant difference in bargaining position, (2) consumer is represented by legal counsel (3) in a transaction for a consideration in excess of $500,000, (4) waiver is made in an express provision, (5) in a written contract, and (6) signed by both the consumer and the consumer's counsel). The Court has no difficulty deciding that Leslie's allegations are sufficient to survive Rule 12(b)(6).

The DTPA 60-day demand letter requirement is never a ground for outright dismissal of a claim. *Hines v. Hash*, 843 S.W.2d 464, 468-69 (Tex.1993) (The purpose of the statute "is better served by abating an action filed without notice for the duration of the [60-day] statutory notice period ... than by dismissing the action altogether;" "defendant must request an abatement with the filing of an answer or very soon thereafter."). Abatement of this action to facilitate settlement will be most appropriate after the Fifth Circuit has ruled on an interlocutory appeal of this order.

B. Securities fraud

Upon *de novo* review of the magistrate's recommendation, the Court is of the opinion that Leslie has stated a claim for securities fraud and done so with sufficient particularity to survive a motion to dismiss. Lloyd's primary objection to Leslie's securities fraud claim is not that Leslie has failed to allege either (1) misrepresentations or failures to disclose material information, (2) "[a] device, scheme or artifice to defraud," or (3) "a[n] act, practice, or course of business which operates as a fraud or deceit," in connection with a transaction in securities. 17 C.F.R. part 240.10b-5. Rather, Lloyd's objects that the transactions of which Leslie complains never involved the purchase or sale of any security. See Dkt. # 5, at 51-55. Lloyd's also argues that Leslie has failed to allege both loss and transaction causation. Reviewing Leslie's pleadings, it is apparent they sufficiently allege both forms of causation—that Leslie would not have entered into transactions but for the fraud, and that the fraud caused damage to Leslie.

Although Lloyd's appears to concede that "Leslie's allegations tend to show that he sought and acquired his position as an underwriting member as a prerequisite to his participation in an investment," id at 48-49, the Court agrees with Lloyd's that Leslie has not alleged that he purchased a security solely by purchasing a Lloyd's Name. Leslie alleges that he purchased securities when he purchased participations in Lloyd's syndicates, see Dkt. # 89 at ¶ 31, and that Lloyd's represented to him that the only way to qualify for purchasing these securities was to purchase a Name. While it may be debatable whether Leslie's overall transaction with Lloyd's insiders constituted an "investment contract"[38] or other security, the Court elects to hold that a bare Name is not an "investment contract," as that term is defined in the controlling cases. *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 558, 99 S.Ct. 790, 796, 58 L.Ed.2d 808 (1979); *United Housing Found., Inc. v. Forman*, 421 U.S. 837, 851-52, 95 S.Ct. 2051, 2060, 44 L.Ed.2d 621 (1975); *Securities & Exch. Comm'n v. W.J. Howey Co.*, 328 U.S. 293, 301, 66 S.Ct. 1100, 1104, 90 L.Ed.2d 1244 (1946); *Securities & Exch. Comm'n v. Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir.1974).

While a Name, by itself, may not be a security, Leslie certainly has purchased securities in the form of participations in Lloyd's syndicates. The Court finds instructive the position of the Securities and Exchange Commission ("SEC") on the subject:

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38. The test for an "investment contract" is whether the scheme involves an investment of money in a common enterprise with profits to come primarily from the efforts of others. *Securities & Exch. Comm'n v. W.J. Howey Co.*, 328 U.S. 293, 301, 66 S.Ct. 1100, 1104, 90 L.Ed.2d 1244 (1946); *Securities & Exch. Comm'n v. Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir.1974). "Th[e] [Howey/Forman] test is to be applied in light of 'the substance--the economic realities of the transaction--rather than the names that may have been employed by the parties.' " *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 558, 99 S.Ct. 790, 796, 58 L.Ed.2d 808 (1979). The Howey economic reality test was designed to determine whether a particular investment is an "investment contract," not whether it fits within any of the examples listed in the statutory definition of "security." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 691, 105 S.Ct. 2297, 2304, 85 L.Ed.2d 692 (1985) (emphasis in original).

> The staff of the Commission's Division of Corporate Finance has had discussions with Lloyd's concerning the applicability of the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act") to the solicitation of U.S. Citizens to participate in Lloyd's. It is the Division's position that the solicitation of participations involves the sale of a security, with the issuer of that security being the particular Members' Agent involved. Accordingly, such U.S. sales would be subject to all of the provisions of the Securities Act and the Exchange Act, including the anti-fraud provisions. At the time of those prior discussions, it was determined that if the Members' Agents solicited participations in accordance with the procedures proposed by Lloyd's counsel (an offering structure intended to comply with the Commission's Regulation D), registration under the Securities Act would not be required. However, in light of the issues raised by Mr. Roby and others, the staff may consider ... whether further action is appropriate.
>
> ....
>
> While Lloyd's participations do more closely resemble general partnership interests than they do other securities, such as shares of common stock, they are quite unique investments.... There is no existing precedent as to whether Lloyd's participations are securities but, as we pointed out above, the Division of Corporate Finance believes they are securities and as such are subject to the provisions of the Federal securities laws in the same manner and to the same extent as more conventional securities.... [S]ubject to certain limitations and conditions, the provisions of the Federal securities laws generally are as applicable to the sales of foreign securities (including participations in Lloyd's) in the United States as they are to the sales of domestic securities.

Letter from Mary E.T. Beach, Senior Associate Director of the Division of Corporate Finance, United States Securities and Exchange Commission, to Hon. Donald J. Pease, Member, United States House of Representatives 2-3 (Aug. 5, 1991) (emphasis added), reprinted in

Respondent's Brief in Opposition at App. A, *Riley v. Kingsley Underwriting Agencies, Ltd.*, 506 U.S. 1021, 113 S.Ct. 658, 121 L.Ed.2d 584 (Dec. 7, 1992) (No. 92-664). The position of the Securities and Exchange Commission—that participations in a Lloyd's syndicate are securities—is correct. The purchase of a participation involves the investment of money—delivery of a clean irrevocable letter of credit and assumption of unlimited several liability[39]—in a common enterprise, Lloyd's and/or a Lloyd's syndicate, with profits to come solely[40] from the efforts of others—such as brokers at Lloyd's and the syndicate's Managing Agent. *United Housing Found., Inc.*, 421 U.S. at 851-52, 95 S.Ct. at 2060; *Securities & Exch. Comm'n v. W.J. Howey Co.*, 328 U.S. at 301, 66 S.Ct. at 1104; see also *Reves v. Ernst & Young*, 494 U.S. 56, 60, 110 S.Ct. 945, 949, 108 L.Ed.2d 47 (1990) (in enacting the securities laws, Congress "recognized the virtually limitless scope of human ingenuity, especially in the creation of 'countless and variable schemes devised by those who seek [to] use ... the money of others on the promise of profits.' ") (quoting Howey); *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 691, 105 S.Ct. 2297, 2304, 85 L.Ed.2d 692 (1985) (transaction may be a "security" even though it does not satisfy the Howey economic reality test); *Securities & Exch. Comm'n v. Koscot Interplanetary, Inc.*, 497 F.2d 473 (5th Cir.1974) ("solely from the efforts of others" criterion "would be easy to evade" if applied too literally; "[t]he admitted salutary purposes of the Acts can only be safeguarded by a functional approach to the Howey test.").

Congress has expressly granted the SEC regulatory authority under the 1933 and 1934 Acts. See 15 U.S.C. §§ 77c(b), (c), 77f(d), 77i, 77s(a), 78u, 78u-2, 78w(a)(1), 78y; see also 17 C.F.R. part

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39. As a Name increases the number of syndicates he or she underwrites or increases his or her share of the underwriting business of a particular syndicate, Lloyd's requires the Name to increase the face value of the clean, irrevocable letter of credit.

40. Passive Names "are not permitted an active role in the day-to-day business of insuring risks or handling claims." See Dkt. # 5, at 10-11 (emphasis added).

230.100(b). Relevant precedent indicates the courts should grant significant deference to administrative decisions when an agency has regulatory authority over matters a court must address. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984) ("The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly ... if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *Stinson v. United States*, 508 U.S. 36, 113 S.Ct. 1913, 1919, 123 L.Ed.2d 598 (1993) ("Provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' ") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed.2d 1700 (1945)). In this case, the position of the SEC Division of Corporate Finance that participations in Lloyd's syndicates are regulated securities is based upon a permissible construction of the 1933 and 1934 Acts, and is not plainly erroneous or inconsistent with agency regulations. The Court holds these participations are securities as that term is defined in the 1933 and 1934 Acts.

The SEC also takes the position that Lloyd's program of soliciting Names in the United States, as Lloyd's described its activities to the SEC, is exempt from the registration requirement of the 1933 Securities Act under the SEC's Regulation D. *See 17 C.F.R.* §§ 230.501-230.508. ("Reg D"). It bears mentioning that the Reg D "private offering" exemption is not to be confused with an exemption from the anti-fraud provisions of the 1933 and 1934 Acts. *See Landreth Timber Co.*, 471 U.S. at 692 & n. 6, 105 S.Ct. at 2305 & n. 6 (quoting Louis Loss favorably for the proposition that "saying ... the fraud provisions do not apply to private transactions" is "heresy"); *Aedna Exploration Co. v. Sylvan*, 860 F.2d 1242, 1251 & n. 42 (5th Cir. 1988); 17 C.F.R. § 230.501 *et seq.* preliminary note 1 ("Such transactions are not exempt from the antifraud, civil liability, or other provisions of the

federal securities laws. Issuers are reminded of their obligation to provide such further material information ... as may be necessary to make the information required under this regulation, in light of the circumstances ... not misleading.").[41]

Even though the bare sale of a Name is not an "investment contract," and therefore Lloyd's itself is not necessarily an "issuer" of securities, the Court is of the opinion that Leslie has alleged sufficient facts to support a cause of action against Lloyd's under Rule 10b-5, which prohibits "any device, scheme, or artifice to defraud," any material misrepresentation or failure to disclose, or "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person ... in connection with the purchase or sale of any

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41. But see Respondent's Brief in Opposition at 1-2, *Riley v. Kingsley Underwriting Agencies, Ltd.*, 506 U.S. 1021, 113 S.Ct. 658, 121 L.Ed.2d 584 (Dec. 7, 1992) (No. 92-664) (confusing the Reg D registration exemption with an exemption from the anti-fraud provisions of the 1933 and 1934 Acts):

> Petitioner errs in suggesting that the decision below deprives him of a right available to him under the U.S. securities laws. When the [SEC] in 1987 and 1988 reviewed the whole issue of offering membership in Lloyd's to United States persons, it concluded that if the Members' Agents solicited participation in Lloyd's in compliance with ... the Commission's Regulation D, registration under the Securities Act was not required.

Id. (emphasis in original). While this action has been pending, the Supreme Court handed down Gustafson, 513 U.S. 561, 115 S.Ct. 1061, which holds that the rescission anti-fraud remedy provided in section 12(2) of the 1933 Act applies only to initial offerings of securities to the public, and not to secondary or private transactions in securities. However, Leslie has never relied upon section 12(2), and Gustafson contains no indication whatsoever that the 10b-5 remedy would or should ever be subject to similar limitations.

security." The cases establish beyond peradventure that Rule 10b-5 actions are not strictly limited to claims against the "issuer" of the securities in question.[42]

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42. *See Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S 299, 315-19, 105 S.Ct. 2622, 2631-33, 86 L.Ed.2d 215 (1985) (recognizing cause of action by "tippee" against securities broker "tipper" who supplies tippee with purported inside information later discovered to be false); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 150-54, 92 S.Ct. 1456, 1470-72, 31 L.Ed.2d 741 (1972) (recognizing claim for trader's failure to disclose material information about market conditions); *Securities & Exch. Comm'n v. Capital Gains Research Bureau*, 375 U.S. 180, 186, 84 S.Ct. 275, 280, 11 L.Ed.2d 237 (1963) (providing cause of action for "scalping" practices of investment adviser); *Jolley v. Welch*, 904 F.2d 988, 993 (5th Cir.1990) (discussing the "churning" cause of action), cert. denied, 498 U.S. 1050, 111 S.Ct. 762, 112 L.Ed.2d 781 (1981); *Laird v. Integrated Resources, Inc.*, 897 F.2d 826, 838 (5th Cir.1990) (recognizing that 10b-5 "churning" violation may constitute a RICO predicate offense); *United States v. Winans*, 612 F.Supp. 827, 838-48 (S.D.N.Y.1985), aff'd sub nom. *United States v. Carpenter*, 791 F.2d 1024, 1028-34 (2d Cir.1986) (affirming conviction of Wall Street Journal "Heard on the Street" columnist for trading on column contents in advance of publication), aff'd, 484 U.S. 19, 24, 108 S.Ct. 316, 320, 98 L.Ed.2d 275 (1987) (equally divided court); *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 324-25 (5th Cir. Unit A 1981) (recognizing 10b-5 "churning" cause of action, which "occurs when a securities broker enters into transactions and manages a client's account for the purpose of generating commissions and in disregard of his client's interests"); *Mihara v. Dean Witter & Co., Inc.*, 619 F.2d 814 (9th Cir.1980); *Zweig v. Hearst Corp.*, 594 F.2d 1261 (9th Cir.1979) (recognizing 10b-5 cause of action against financial columnist for failure to disclose conflict of interest); *see also Basic, Inc. v. Levinson*, 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988) (approving "fraud on the market" presumption of reliance on material misrepresentations); *Dirks v. Securities & Exch. Comm'n*, 463 U.S. 646, 103 S.Ct. 3255, 77 L.Ed.2d 911 (1983) (qualifying Chiarella with requirement of personal gain motivation); *Chiarella v. United States*, 445 U.S. 222, 226-30, 100 S.Ct. 1108, 1113-15, 63 L.Ed.2d 348 (1980) (in a 10b-5 action against a "markup man" in a financial printing operation, holding that failure to disclose material information "may constitute a manipulative or deceptive device" if the jury is properly instructed on whether the party charged with the failure to disclose, such as "an insider [or] a fiduciary," is "under a duty to disclose it"); *id.* 445 U.S. at 230 n. 12, 100 S.Ct. at 1116 n. 12 (distinguishing *Shapiro v. Merrill, Lynch, Pierce, Fenner & Smith*, 495 F.2d 228, 237-38 (2d Cir.1974)); *Securities & Exch. Comm'n v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir.1968), cert. denied, 404 U.S. 1005, 92 S.Ct. 561, 30 L.Ed.2d 558 (1972).

V. EXTRATERRITORIAL APPLICATION OF UNITED STATES LAWS

A. Securities Exchange Act of 1934

Relying primarily upon *Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 111 S.Ct. 1227, 113 L.Ed.2d 274, 59 U.S.L.W. 4225 (1991) (hereafter, "EEOC "), Lloyd's argues that the 1934 Securities Exchange Act does not apply extraterritorially.[43] It is well-settled that the 1934 Act, and Rule 10b-5, apply extraterritorially to certain transactions in foreign commerce, and the Court is of the opinion that the securities laws apply extraterritorially in this case.

In *EEOC*, 499 U.S. at ——, 111 S.Ct. at 1229, 1236, the Supreme Court decided that Title VII of the Civil Rights Act of 1964, as amended, does not apply extraterritorially to regulate "the employment practices of United States employers who employ United States citizens abroad." In so ruling, the Court affirmed, and arguably strengthened, the "presumption" against extraterritorial application of

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43. Lloyd's does not argue that section 27 of the 1934 Act, 15 U.S.C. § 78aa, does not authorize service of process upon it. *Cf. Omni Capital Int'l v. Rudolf, Wolf & Co.*, 484 U.S. 97, 105-07, 108 S.Ct. 410, 98 L.Ed.2d 415 (1987) (addressing service of process under § 22 of the Commodity Exchange Act). Unlike § 22 of the Commodity Exchange Act, § 27 of the Securities Exchange Act of 1934 "authorizes service of process 'wherever the defendant may be found.' " *Securities & Exch. Comm'n v. Unifund SAL*, 910 F.2d 1028, 1033-34 (2d Cir.) (quoting 15 U.S.C. § 78aa), reh'g denied, 917 F.2d 98 (2d Cir.1990).

federal statutes, "unless a contrary [legislative] intent appears."[44] *Id.* at 1230 (citing *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 284-85, 69 S.Ct. 575, 577, 93 L.Ed.2d 680 (1949)). Before the year was out, Congress clearly expressed its contrary legislative intent. See 42 U.S.C. § 2000e(f); *Landgraf v. USI Film Prods.*, — U.S. ——, ——, 114 S.Ct. 1483, 1489-90, 128 L.Ed.2d 229, 62 U.S.L.W. 4255 (1994).

The EEOC court determined that the definition of "Commerce" in Title VII, which included "trade, traffic, commerce ... or communication among the several states; or between a State and any place outside thereof," "is ambiguous, and does not speak directly to the question presented here." *EEOC*, 499 U.S. at ——, 111 S.Ct. at 1231 (emphasis added). In contrast, the 1934 Securities Exchange Act is not at all ambiguous: "The term interstate commerce means trade, commerce, transportation, or communication among the several states, or between a foreign country and any State, or between any State or place or ship outside thereof." 15 U.S.C. § 78c(a)(17) (emphasis added); see also 15 U.S.C. § 78aa.

Moreover, legal developments subsequent to EEOC provide strong indications that EEOC did nothing to alter the longstanding rule that the 1934 Act may apply extraterritorially to some securities transactions. In an appeal from a Second Circuit decision involving plaintiffs who were neither United States residents nor citizens, which

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44. This approach has not gone without comment. See GARY B. BORN & DAVID WESTIN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS 585-90 (2d ed. 1992); Scott A. Burns, The Application of U.S. Antitrust Law to Foreign Conduct: Has Hartford Fire Extinguished Considerations of International Comity, 15 U.PA.J.INT'L BUS.L. 221, 249-52 (1994); David L. Shapiro, Continuity and Change in Statutory Interpretation, 67 N.Y.U.L.REV. 921, 959 & n. 195 (1992); Russell J. Weintraub, The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach, 70 TEX.L.REV. 1799, 1822 (1992) (Weintraub argues in favor of rejecting a "choice-" or "conflict-of-law" approach to international securities and antitrust cases, and adopting instead a rebuttable presumption that the relevant statutes apply extraterritorially).

not only reaffirmed both traditional tests for the extraterritorial application of Rule 10b-5, but held as well that RICO may apply extraterritorially, the Supreme Court denied certiorari. *Alfadda v. Fenn*, 935 F.2d 475, 479-80 (2d Cir.1991) (decided June 5, 1991; EEOC was decided March 26, 1991) ("Under our decisions, two tests have emerged for determining whether a federal court has subject matter jurisdiction over a foreign plaintiff's claim under the antifraud provisions of the securities laws [,] ... the 'conduct' test, [and] ... the 'effects' test."), cert. denied, 502 U.S. 1004, 112 S.Ct. 638, 116 L.Ed.2d 656, 60 U.S.L.W. 3418 (1991). Second, the United States Court of Appeals for the District of Columbia Circuit held that the National Environmental Policy Act of 1969 required a federal agency to prepare an environmental impact statement in advance of implementing a waste incineration program at a base in *Antarctica. Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528 (D.C.Cir.1993). Third, the Supreme Court held that the Sherman Act would apply extraterritorially in a lawsuit against London reinsurers, and that international comity would not require the United States to decline to enforce the Sherman Act unless "there is in fact a true conflict between domestic and foreign law."[45] *Hartford Fire Ins. Co.*, — U.S. at ——, 113 S.Ct. at 2908-10; *see also id.* at 2917-19 (Scalia, J., dissenting) (*citing EEOC*); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n. 6, 106 S.Ct. 1348, 1354 n. 6, 89 L.Ed.2d 538 (1986).

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45. Incidentally, the English Parliament in 1980 passed The Protection of Trading Interests Act, 1980, ch. 11 (Eng.), which was primarily responsive to extraterritorial application of the Sherman Act by the United States. This legislation includes a "clawback" provision creating a cause of action in England for recovery as damages any monies awarded in a foreign jurisdiction (i.e. the United States), and actually collected, in excess of compensatory damages (i.e. Sherman Act treble damages). Of course, this statute does not indicate there is any "true conflict" between the requirements of English law and the prohibitions contained in United States antitrust, racketeering, or consumer protection laws. However, the Protection of Trading Interests Act is an indication that English and American policies differ considerably insofar as the remedies each country provides for wrongdoing.

If the EEOC Court's election to re-emphasize the Foley Bros., 336 U.S. at 284-85, 69 S.Ct. at 577, presumption against extraterritoriality did not warrant the Supreme Court's revisiting extraterritorial application of the Sherman Act[46] in Hartford Fire Ins. Co., — U.S. at ——, 113 S.Ct. at 2908-10, then this Court is not aware of any reason to view EEOC as a mechanism for revisiting the multitude of post-Foley Bros. cases holding that the United States securities laws can apply extraterritorially, either to foreign defendants who have allegedly defrauded United States investors, *see Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 985-87 (2d Cir.), cert. denied sub nom. *Bersch v. Arthur Andersen & Co.*, 423 U.S. 1018, 96 S.Ct. 453, 46 L.Ed.2d 389 (1975); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1333-35 (2d Cir.1972) (involving an American corporation and a British subsidiary as plaintiffs); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206-08 (2d Cir.), rev'd in part on other grounds, 405 F.2d 215 (2d Cir.1968) (en banc), cert. denied *sub nom. Manley v. Schoenbaum*, 395 U.S. 906, 89 S.Ct. 1747, 23 L.Ed.2d 21^ (1969), or in favor of foreign plaintiffs alleging fraud in a foreign securities transaction, in a 10b-5 claim based either upon conduct in the United States or upon a transaction's substantial effect

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46. Like Rule 10b-5 violations, Sherman Act violations by foreign defendants with a direct and substantial effect on United States commerce have long been held actionable in United States courts, despite the presumption stated in *Foley Bros. Matsushita Elec. Indus. Co.*, 475 U.S. 582-83, 106 S.Ct. at 1351-54; *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704, 82 S.Ct. 1404, 1413, 8 L.Ed.2d 777 (1962); *Timberlane Lumber Co. v. Bank of Am.*, 749 F.2d 1378, 1386 (9th Cir.1984), cert. denied, 472 U.S. 1032, 105 S.Ct. 3514, 643 L.Ed.2d 87 (1985); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 921-26 (D.C.Cir.1984); *see also United States v. Aluminum Co. of Am.*, 148 F.2d 416 (1945); cf. *Steele v. Bulova Watch Co.*, 344 U.S. 280, 288, 73 S.Ct. 252, 256, 97 L.Ed.2d 319 (1952) (Lanham Act) (*cited in EEOC*, 111 S.Ct. at 1232-1233). Congress recently attempted to clarify the standard for extraterritorial application of the Sherman Act when it passed the Foreign Antitrust Improvements Act. 15 U.S.C. § 6a ("Section 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless ... such conduct has a direct, substantial, and reasonably foreseeable effect [on interstate commerce, import commerce, or export commerce by United States exporter.]").

on United States securities markets. *See Alfadda*, 935 F.2d at 479- 80 (2d Cir. 1991), cert. denied, 502 U.S. 1005, 112 S.Ct. 638 (1991); *MCG, Inc. v. Great Western Energy Corp.*, 896 F.2d 170 (5th Cir. 1990); *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir.), modified, 890 F.2d 569 (2d Cir.), cert. dism'd, 492 U.S. 939, 110 S.Ct. 29, 106 L.Ed.2d 639 (1989); *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 31-33 (D.C.Cir. 1987) (limiting extraterritorial application of 10b-5 in favor of foreign plaintiffs to the "conduct" test); Bersch, 519 F.2d at 985-87. Nor would EEOC appear to require courts to revisit issues concerning the extraterritorial application of other commerial statutes. *See, e.g., Steele v. Bulova Watch Co.*, 344 U.S. 280, 286, 73 S.Ct. 252, 97 L.Ed.2d 319 (1952) (Lanham Act). Unless and until the Supreme Court or the Fifth Circuit directs otherwise, this Court will consider itself bound by the standard announced in *MCG, Inc.*, 896 F.2d at 173-75 ("The first predicate for extending jurisdiction involves conduct occurring in the United States that has an effect on [U.S.] securities markets or [U.S.] investors."), and *United States v. Cook*, 573 F.2d 281, 283-84 (5th Cir.), cert. denied, 439 U.S. 836, 99 S.Ct. 119, 58 L.Ed.2d 132 (1978).

Lloyd's also argues that MCG requires this Court to hold that Rule 10b-5 does not apply extraterritorially in this case. Obviously, MCG does not stand for the proposition that the presumption against extraterritoriality precludes application of Rule 10b-5 to a transaction involving the offering and sale of a security in the United States to a United States investor merely because the issuer happened to be headquartered in England, *see MCG*, 896 F.2d at 174—even if that security happened to be a participation in a Lloyd's syndicate. The reason the MCG court declined to recognize Rule 10b-5 subject matter jurisdiction under the particular facts of that case was the extraordinary length to which the American plaintiffs had gone to circumvent the United States securities laws:

> Our analysis begins and ends with the district court's finding that MCG sought, through extensive machinations, to avoid the application of the federal securities laws and their attendant obligations in order to facilitate their investment in a foreign

> offering from which they were disqualified, doing so without the knowledge of the defendants.... The policy concerns that have resulted in the extension of subject matter jurisdiction are not implicated where, as here, the "foreign" purchaser seeking protection is a mere "shell" created to avoid the securities laws. Having gone to such lengths to structure a transaction not burdened by the securities laws, plaintiffs cannot expect to wrap themselves in their protective mantle when the deal sours.

MCG, 896 F.2d at 175. Lloyd's has not presented the Court with any evidence that Leslie ever attempted to structure his transaction with Lloyd's in an effort to circumvent the securities laws of the United States.

It is true that Lloyd's requires all Names to take part in a ritual ceremony in London at which certain closing documents are executed. However, this alone cannot be sufficient evidence to establish that Leslie's transaction was wholly foreign.[47] To adopt such a rule would elevate mere formalism over the economic realities of today's global financial markets. The Court is of the opinion that Lloyd's repeated emphasis on the formal closing ceremony in London is a substantial indication that Lloyd's, not Leslie, with full knowledge of the probable application of the United States securities laws to any sales of syndicate

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47. Lloyd's might have more success making this argument if the facts in this case were more similar to the facts in *Hirsch v. Oakely Vaughn Underwriting, Ltd.*, No. H-87-3727 (S.D.Tex., Dec. 14, 1988), aff'd, 904 F.2d 704 (5th Cir., May 31, 1990) (No. 89-2563), cert. denied, 498 U.S. 981, 111 S.Ct. 511 (1990). The plaintiff in Hirsch initially contacted his underwriter through his English cousin and conducted the bulk of the transaction in England. The only meeting in Houston, the trial court said, was "to discuss a matter unrelated to this case." Slip op. at 3. The trial court concluded it was "unable to find substantial contacts with this Defendant" in the United States. *Id.*

participations to United States Names,[48] attempted to circumvent the U.S. securities laws through the structure of its transactions. Further evidence of such an effort on Lloyd's part is Lloyd's take-it-or-leave-it offer in 1986 that Leslie either sign the revised General Undertaking or discontinue his underwriting activities.

Both the allegations and the evidence support the conclusion that Lloyd's transaction with Leslie was predominantly a domestic securities transaction in the United States, not a wholly foreign transaction. Lloyd's initially contacted Leslie in the United States and Parnell recruited Leslie by visiting him in Houston. Most of the alleged misrepresentations took place either in the United States or through postal or electronic communications in foreign commerce between the United States and England. Leslie signed the revised General Undertaking in the United States and returned it by mail to England. Leslie maintained a clean, irrevocable, letter of credit, which represented the extent of his undertaking at Lloyd's, with Texas Commerce Bank in Houston.

Moreover, this transaction was by no means an isolated event with a negligible effect upon United States citizens and securities markets.[49] Cf. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607,

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48. See Letter from Mary E.T. Beach, Senior Associate Director of the Division of Corporate Finance, United States Securities and Exchange Commission, to Hon. Donald J. Pease, Member, United States House of Representatives 2-3 (Aug. 5, 1991) (emphasis added), reprinted in Respondent's Brief in Opposition at App.A, *Riley v. Kingsley Underwriting Agencies, Ltd.*, 506 U.S. 1021, 113 S.Ct. 658, 121 L.Ed.2d 584 (Dec. 7, 1992) (No. 92-664).

49. The Supreme Court in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992), held that a foreign sovereign was not immune from a suit brought in United States courts, solely by non-U.S. plaintiffs, for breach of contract, involving Argentina's unilateral restructuring of some debt securities it had issued in foreign markets. The Court not only held that issuing such debt was "commercial activity," as that term is used in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), but that the Argentine government's breach of contract with foreign investors had a "direct effect" in the United States. *Id.*, 504 U.S. at ----, 112 S.Ct. at 2168-69. In determining that the restructuring had a "direct effect," the

112 S.Ct. 2160, 2167-69, 119 L.Ed.2d 394 (1992). During the late 1970s and early to mid 1980s, evidence indicates that Lloyd's conducted a widespread and systematic campaign to recruit new Names in the United States and elsewhere. Documents published by Lloyd's show that no fewer than 2,000 United States citizens have pledged their entire personal estates to become Lloyd's Names in the last two decades.[50] Lloyd's admits that, as of December 1990, no fewer than sixty-four of these Names resided in Texas. Dkt. # 21, at 2. The Court is of the opinion that Lloyd's and the registered syndicates at Lloyd's were directly involved in the distribution of securities throughout the United States, and by entering this market have elected

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Court looked to the Due Process Clause of the Fifth Amendment and the *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed.2d 95 (1945) "minimum contacts" requirements for personal jurisdiction, but "only as an aid in interpreting the direct effect requirement of the [FSIA]." *Republic of Argentina*, 504 U.S. at ----, 112 S.Ct. 2169 & n. 2. "By issuing negotiable debt instruments denominated in U.S. dollars and payable in New York," the Court held, "Argentina purposefully availed itself of the privilege of conducting [commercial] activities within the United States." *Id.* at 2169 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528 (1985)), and by virtue of this activity, Argentina was subject to being haled into a federal court in the United States. *Id.*; see also *Burger King Corp.*, 471 U.S. at 473, 105 S.Ct. at 2182 ("[W]e have emphasized that parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other state for the consequences of their activities."); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 482-83, 103 S.Ct. 1962, 1965-66, 76 L.Ed.2d 81 (1983) (action against foreign government by foreign plaintiff, based upon Nigeria's unilateral amendment of an unconfirmed letter of credit it had established with a United States bank, is not beyond the Article III power of federal courts).

50. The 1992 report of the Lloyd's Task Force, LLOYD'S OF LONDON, LLOYD'S: A ROUTE FORWARD 26, at Ex. 6 (1992), reports that United States Names in 1991 constituted 7.7% of the total membership base of Lloyds, or roughly 2044 out of 26,539 Names. United States Names in 1981 accounted for 6.6% of the membership base, or roughly 1263 out of 19,137 Names. In contrast, Names anywhere outside the United Kingdom in 1971 accounted for only one percent of the total membership base, or roughly sixty out of 6,020 total names.

to subject themselves to the anti-fraud and disclosure requirements of the United States securities laws.[51] *See Leasco Data Processing Equip. Corp.*, 468 F.2d at 1334 n. 3.

Although much of Lloyd's business—the (re)insurance underwriting process and most of the regulatory activity Lloyd's promised to perform—took place in England, the focus of this lawsuit is upon the actions of Lloyd's and its agents as Lloyd's sought access to investment capital in the United States. The securities laws "recogniz[e] the virtually limitless scope of human ingenuity, especially in the creation of 'countless and variable schemes devised by those who seek to use the money of others on the promise of profits.' " *Reves*, 494 U.S. at 60, 110 S.Ct. at 949 (quoting Howey). Under the circumstances, the Court concludes that neither the location of Lloyd's headquarters nor the location of Lloyd's mandatory closing ceremony was a legal factor sufficient to entitle Lloyd's "purposefully [to] avai[l] itself of the privilege" of access to United States investors and capital markets, see supra note 49 (*quoting Republic of Argentina*, 504 U.S. at ——, 112 S.Ct. at 2169), "on the promise of profits," *Reves*, 494 U.S. at 60, 110 S.Ct. at 949, without fulfilling the corresponding responsibilities that our laws require.

B. Deceptive Trade Practices Act

Lloyd's underwriters voluntarily subject themselves to the possibility of DTPA remedies for false, deceptive, or unconscionable

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51. MCG provides a fine example of how an issuer of securities in a foreign market can avoid the application of the United States securities laws:

As reflected in the prospectus prepared by Brown, the Great Western Shares, as foreign securities, were not registered with the Securities and Exchange Commission. Accordingly, they had to be offered exclusively to investors who were neither citizens, residents, nationals, nor chartered residents of the United States.

MCG, 896 F.2d at 172.

trade practices when they sell insurance policies to Texas consumers.[52] Tex.Ins.Code Ann. arts. 18.23(b), 12.21, § 16(a) (Vernon 1981 & Supp.1995); *see, e.g., Hull & Co. v. Chandler*, 889 S.W.2d 513 (Tex.App.—Houston [14th Dist.] 1994, writ denied); *Lloyd's of London v. Walker*, 716 S.W.2d 99, 102-03 (Tex.App.— Dallas 1986, writ ref'd n.r.e.); *American Ins. Cos. v. Reed*, 626 S.W.2d 898 (Tex.App.—Eastland 1982, no writ); *Union Indem. Ins. Co. v. Certain Underwriters at Lloyd's*, 614 F.Supp. 1015 (S.D.Tex.1985); *see also Belefonte Underwriters Ins. Co. v. Brown*, 704 S.W.2d 742, 745 (Tex.1986); *Union Pac. Resources Co. v. Aetna Casualty & Sur. Co.*, 894 S.W.2d 401 (Tex.App.—Fort Worth 1994), application for writ of error filed, 38 Tex.Sup.Ct.J. 637 (May 17, 1995 (95-0473); *Warrilow v. Norrell*, 791 S.W.2d 515 (Tex.App.—Corpus Christi 1989, writ denied). It should hardly be surprising that the DTPA applies to transactions in interstate or foreign commerce involving the purchase of services by Texas consumers, including any "Names" Lloyd's of London sells in Texas.

By its terms, the DTPA provides that "a consumer may maintain an action where any of the following [specified deceptive acts or practices] constitute a producing cause of actual damages," Tex.Bus. & Com.Code Ann. § 17.50(a) (Vernon 1987), without limiting, in geographic terms, the range of possible defendants. *See generally Dowling v. NADW Marketing, Inc.*, 578 S.W.2d 475, 476 (Tex.Civ.App.—Eastland 1979, writ ref'd n.r.e.) (despite contractual clause specifying Louisiana forum, reversing Texas trial court's

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52. Lloyd's conducts a considerable portion of its underwriting business with United States customers. A 1992 report by Lloyds indicates that, excluding inter-syndicate reinsurance, the United States market accounted for thirty-two percent (32%) of Lloyd's underwriting business in 1990. LLOYD'S OF LONDON, LLOYD'S: A ROUTE FORWARD 49 & Ex. 28 (1992). Only the U.K. market, which accounted for 36% of Lloyd's overall business in 1990, is more important to Lloyd's. *Id.* In 1989, the U.S. market was the source of twenty-eight percent (28%) of Lloyd's direct insurance premiums, but accounted for over thirty-eight percent (38.3%) of Lloyd's reinsurance premiums excluding inter-syndicate reinsurance--more than the 31.3% share of reinsurance premiums associated with the U.K. market. *Id.* at 185 & Ex. 96.

dismissal of DTPA action against Louisiana corporation not registered to do business in Texas). The DTPA must be "liberally construed and applied to promote its underlying purposes, which are to protect consumers against false, misleading, and deceptive business practices...." *Id.* § 17.44. Any interpretation of the DTPA that imposes geographic limitations upon the possible range of DTPA defendants would plainly violate this basic principle of construction.

Of course, a state may not regulate aspects of interstate commerce if Congress has expressly preempted such regulation. *See, e.g., American Airlines, Inc. v. Wolens*, 513 U.S. 219, 115 S.Ct. 817, 130 L.Ed.2d 715, 63 U.S.L.W. 4066 (1995) (Airline Deregulation Act of 1978 preempts application of the Illinois Consumer Fraud and Deceptive Business Practices Act to airline's retroactive changes in frequent flier program). However, when the pre-emptive effect of federal enactments is not explicit, courts sustain a local regulation unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747-48, 105 S.Ct. 2380, 2393, 85 L.Ed.2d 728 (1985) (citations omitted). This Court is unaware of any federal regulation that would preempt the application of Texas consumer protection legislation to a transaction in foreign commerce involving services such as those Lloyd's promises its Names. The Court must presume that Congress did not intend to preempt areas of traditional state regulation. *Id.* at 740, 105 S.Ct. at 2389 (citing Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977)).

Nor does this appear to be a case in which the "negative" aspect of the commerce clause, which "denies the [s]tates the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce," applies. *Oregon Waste Sys. v. Department of Envtl. Quality of Or.*, — U.S. ——, ——, 114 S.Ct. 1345, 1349, 128 L.Ed.2d 13 (1994); *C & A Carbone, Inc. v. Town of Clarkston, N.Y.*, — U.S. ——, ——, 114 S.Ct. 1677, 1682, 128 L.Ed.2d 399 (1994). It is no "unjustifiable burden" on interstate commerce to require both

Texans and non-Texans, supplying goods or services to Texas consumers, to refrain from "false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty." Tex.Bus. & Com.Code, § 17.44. Application of the DTPA to defendants located outside Texas or outside the United States, far from fostering discrimination against interstate and foreign commerce, promotes uniform application of consumer protection legislation. In this increasingly interdependent world, it would be small consolation indeed for Texas consumers if the DTPA provides a remedy only for Texas manufacturers' deceptive practices and breaches of warranty, but none for the actions of manufacturers beyond Texas's borders or on the far side of the globe. Nor should the DTPA be limited, for example, to provide certain remedies for a Houston attorney's misbehavior while rendering services to a Houston resident, but no remedy at all to Houston residents seeking services from lawyers located in London or New York.

This case would be more difficult, perhaps, if the only transactions and deceptive practices described in Leslie's pleadings occurred entirely outside this state. However, virtually all the alleged deceptive trade practices took place in Texas. The Court is of the opinion the DTPA should apply extraterritorially under the facts presented in this case.

VI. FORUM-SELECTION AND CHOICE-OF-LAW CLAUSES

In 1986, Lloyd's required Leslie to sign a revised General Undertaking. Although Lloyd's had apparently managed, for the previous three hundred years of its history, without any forum-selection or choice-of-law clauses in the agreements it required members to sign, the revised 1986 General Undertaking contained clauses which, if enforced, required Leslie to bring any claims he might

have in England, for resolution according to English law.[53] It is undisputed that Lloyd's offered Leslie, as an alternative to signing the document, the opportunity to discontinue his underwriting activity with Lloyd's. Although other courts have elected to enforce identical clauses against other Lloyd's Names, see note 35, supra, the Court concludes that the facts of this case are sufficiently different from previous cases that the forum-selection and choice-of-law ("FS/COL") clauses should not be enforced against Robert Leslie. Because Leslie has not raised the issue, the Court will assume, if necessary for present purposes, that the FS/COL agreement was supported by adequate consideration. The Court will also assume, without deciding, that a contractual choice-of-law provision can have the effect of determining which jurisdiction's legal standards apply in all disputes between the contracting parties, including disputes not based upon the contract itself.

A. Retroactivity

Unlike all prior United States cases involving Lloyd's Names, this case presents an issue concerning the retroactive application of the Lloyd's boilerplate FS/COL clauses. Leslie commenced his underwriting activity with Lloyd's in 1977. He did not sign the revised General Undertaking until 1986. Arguably, a fair portion of his claim is based upon conduct and transactions that took place many years before 1986. Other allegations Leslie makes, however, clearly involve conduct by Lloyd's or Lloyd's agents that took place after 1986.

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53. The forum-selection/choice-of-law ("FS/COL") clauses, in substance, are the 1986 General Undertaking. The remainder of the revised General Undertaking consists of (1) an agreement "to comply with the provisions of [the] Lloyds Acts," subordinate legislation, and decisions of designated Lloyd's officials, (2) a clause continuing the FS/COL clauses in effect "notwithstanding that the member ceases, for any reason, to be a Member of ... Lloyd's," and (3) a savings clause, in the event "any term of this Undertaking shall to any extent be invalid or unenforceable."

In contrast, the plaintiff in *Riley v. Kingsley Underwriting Agencies, Ltd.*, No. 91-C-1411 (D.Colo. Aug. 30, 1991), aff'd, 969 F.2d 953 (10th Cir.1992), cert. denied, 506 U.S. 1021, 113 S.Ct. 658, 121 L.Ed.2d 584, 61 U.S.L.W. 3418 (1992), signed only one General Undertaking, before beginning any underwriting activity, which "provided that the courts of England would have exclusive jurisdiction over any dispute and that the laws of England would apply." *Riley*, 969 F.2d at 955. Likewise, the court in *Roby v. Corporation of Lloyd's*, No. 91-Civ-7081 (MEL) (S.D.N.Y. Aug. 18, 1992), aff'd, 996 F.2d 1353, 1362 (2d Cir.1993), cert. denied, 510 U.S. 945, 114 S.Ct. 385, 126 L.Ed.2d 333, 62 U.S.L.W. 317 (1993), pointed out that "at most five of the 109 appellants" in that case would be affected by "[a] slightly different structure [that] existed prior to 1990." *Roby*, 996 F.2d at 1357 n. 1. It is not clear whether any of the five exceptional Roby plaintiffs was an underwriting Name under a General Undertaking that did not contain the FS/COL clauses. The Roby court's analysis was premised upon mandatory, pre- underwriting acceptance of the FS/COL terms: "Names are required to enter directly into two agreements.... The 'General Undertaking' is between a Name and the Lloyd's governing bodies and contains choice of forum (England) and choice of law (English) clauses." *Id.* at 1357-58. In *Bonny v. The Society of Lloyd's*, 784 F.Supp. 1350 (N.D.Ill. May 29, 1992), 3 F.3d 156 (7th Cir.1993), cert. denied, 510 U.S. 1113, 114 S.Ct. 1057, 127 L.Ed.2d 378, 62 U.S.L.W. 3544 (1994), the plaintiffs, before underwriting, "traveled to England and executed a General Undertaking for Membership that included both forum selection and choice of law clauses." *Id.*, 3 F.3d at 158. One prior case, *Shell v. R.W. Sturge, Ltd.*, 850 F.Supp. 620 (S.D.Ohio 1993), aff'd, 55 F.3d 1227 (6th Cir.1995), may have had the potential to raise this issue. *See id.*, 850 F.Supp. at 627-28 & n. 4. However, neither the Shell court nor the magistrate judge in Shell addressed the issue. *Id.* at 622-23, 629-30. Recently decided cases in Texas and California were filed in 1994, too recently for retroactive application of the FS/COL clauses to be an issue. *See Richards v. Lloyd's of London*, No. 94-1211-IEG (POR), 1995 WL 465687, 1995 U.S.Dist. LEXIS 6888 (S.D.Cal. Apr. 28, 1995); *McDade v. NationsBank of Texas, N.A.*, No. H-94-3714 (S.D.Tex. June 26, 1995). Finally, *Hirsch v. Oakely Vaughn Underwriting, Ltd.*, No. H-87-3727

(S.D.Tex., Dec. 14, 1988), aff'd, 904 F.2d 704 (5th Cir., May 31, 1990) (No. 89-2563), cert. denied, 498 U.S. 981, 111 S.Ct. 511 (1990) did not address any FS/COL issue; Hirsch was decided on forum non conveniens grounds.

Therefore, the Court has little guidance in determining whether the FS/COL clauses Leslie signed in 1986 would apply only to claims arising after 1986, or whether they would also apply to claims existing before 1986 that Leslie could have filed, had he known about them. The language of the forum selection clause, which covers "any dispute and/or controversy of whatsoever nature," while not expressly retroactive, is broad and may indicate Lloyd's contemplated its retroactive application. However, the choice-of-law clause is not so sweeping in its terms:

> The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.

(emphasis added). Whether this clause applies retroactively to Leslie's case is an issue subsidiary to the determination whether it is enforceable. If it must be enforced, then its interpretation necessarily depends upon English law.[54] On the other hand, if the clause is unen-

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54. The further possibility remains that "the laws of England," as the term is used in the General Undertaking, include English choice-of-law principles. These choice-of-law principles could potentially refer back to United States or Texas law as governing interpretation of the General Undertaking in this case, a phenomenon known as "renvoi." *See Nailen v. Ford Motor Co.*, 873 F.2d 94, 96-97 & n. 1 (5th Cir.1989); *Shexnider v. McDermott Int'l, Inc.*, 688 F.Supp. 234, 238-39 (W.D.La.1988), aff'd, 868 F.2d 717, 718-19 (5th Cir.), cert. denied, 493 U.S. 851, 110 S.Ct. 150, 107 L.Ed.2d 108 (1989); Larry Kramer, Return of the Renvoi, 66 N.Y.U.L.Rev. 979 (1991); see also Larry Kramer, Rethinking Choice of Law, 90 Colum.L.Rev. 277 (1990); cf. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941) (practice of federal diversity courts to look to the choice-of-law rules of the state in which they sit, and from there to the law of another jurisdiction,

forceable, then it is unnecessary for this Court to determine whether it is retroactive. Because the Court is not necessarily required to reach and decide the retroactivity issue, it is proper for the Court to focus first on whether the FS/COL clauses are enforceable against Leslie.

B. What law governs?

Although it may seem surprising, the enforceability of the Lloyd's FS/COL clauses is a matter of United States maritime law, and this Court considers itself so bound. Until the Sixth Circuit expressly identified, but elected not to address, this choice-of-law issue, see Shell, 55 F.3d at 1229, every federal court confronting the Lloyd's FS/COL clauses,[55] *Bonny*, 3 F.3d at 159-60; *Roby*, 996 F.2d at 1363;

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resembles a form of renvoi called "transmission"). Of course, the tricky question of what law provides the substantive rule of decision concerning the retroactivity issue is largely irrelevant if the substantive rule is the same in both England and the United States. *See Kramer, Return of the Renvoi*, 66 N.Y.U.L.Rev. at 1012 ("First, the court must determine whether there is in fact a conflict of laws, since the mere fact that the parties disagree about the principle of law does not mean that these laws actually conflict."). However, the Court need not answer these questions unless the forum-selection clause is enforceable against Leslie.

55. Perhaps these courts all decided, sub silentio, that the enforceability of such clauses is and should be a matter of federal common law--something proposed in academic circles for some time. *Cf. Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 28-29, 108 S.Ct. 2239, 2243, 101 L.Ed.2d 22 (1988) (cited in *Carnival Cruise Lines, Inc.*, 499 U.S. at 589, 111 S.Ct. at 1522); *Caldas & Sons, Inc. v. Willingham*, 17 F.3d 123, 127 & n. 3 (5th Cir.1994) (recognizing, but not deciding, this question); *Kevlin Servs., Inc. v. Lexington State Bank*, 46 F.3d 13, 15 (5th Cir.1995) (per curiam) (not addressing this question). However, none of them said so expressly or dealt with any Erie or Klaxon problems this might create. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Klaxon*, 313 U.S. 487, 61 S.Ct. 1020; 28 U.S.C. § 1652 ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in the courts of the United States, in cases where they apply."); see also *Lampf*, 501 U.S. at 355, 111 S.Ct. at 2778 (citing 28 U.S.C. § 1652). The other cases cited by the Bonny, Roby, Riley, and Shell courts, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985), and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449,

Riley, 969 F.2d at 957-58; *Shell*, 850 F.Supp. at 621-22, has relied upon two admiralty cases by the United States Supreme Court in determining whether the clauses are enforceable. *See Carnival Cruise Lines v. Shute*, 499 U.S. 585, 111 S.Ct. 1522, 1525, 113 L.Ed.2d 622 (1991) (forum-selection clause) ("We begin by noting the boundaries of our inquiry. First, this is a case in admiralty and federal law governs the forum-selection clause we scrutinize.") (emphasis added); *The Bremen v. Zapata Off-Shore Company*, 407 U.S. 1, 10, 92 U.S. 1907, 1913, 32 L.Ed.2d 513 (1972) (forum-selection and exculpatory clauses) ("[C]ourts are tending to adopt a more hospitable attitude toward forum- selection clauses. This view, advanced in the well-reasoned dissenting opinion in the instant case, is that such clauses are prima facie valid and should be enforced unless enforcement is shown

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41 L.Ed.2d 270 (1974), involve the enforceability of arbitration agreements under authority of the Federal Arbitration Act, 9 U.S.C. § 1, *see Scherk*, 417 U.S. at 510, 94 S.Ct. at 2453 (the Act "revers[ed] centuries of judicial hostility to arbitration agreements"), an issue this case no longer presents. *See also Mastrobuono v. Shearson Lehman Hutton, Inc.*, --- U.S. ----, ----, 115 S.Ct. 1212, 1215-16, 1219, 131 L.Ed.2d 76, 63 U.S.L.W. 4195 (1995); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. ----, ----, ----, 115 S.Ct. 834, 838-39, 843, 130 L.Ed.2d 753, 63 U.S.L.W. 4079 (1995). Of course, the Scherk exception to the rule in *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed.2d 168 (1953), is no longer of any moment because Wilko has been squarely overruled. *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484, 109 S.Ct. 1917, 1921, 104 L.Ed.2d 526 (1989). Moreover, one commentator has argued:

> A final issue not adequately addressed by the Seventh Circuit in Bonny is the possibility that the solicitation of the plaintiffs in the United States to invest in Lloyd's would constitute sufficient contacts to overcome the presumptive validity of the forum selection and choice-of-law clauses. The majority in *Scherk v. Alberto-Culver Co.* conceded that there may be some situations where the foreign contacts are so insignificant or attenuated that the principles of Wilko should still apply. This concession was in response to the dissent's concern in Scherk that the majority's analysis could result in American investors being forced to arbitrate their claims in a foreign country despite the fact that material misrepresentations inducing them to invest in a foreign corporation were made in the United States; a fact pattern very similar to Bonny.
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> Jennifer M. Eck, Note, Turning Back the Clock: A Judicial Return to Caveat Emptor for U.S. Investors in Foreign Markets, 19 N.C.J.Int'l L. & Comm.Reg. 313 (1994) (footnotes omitted).

by the resisting party to be "unreasonable" under the circumstances. We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty.") (emphasis added). This Court will do the same. *But see O'Melveny & Myers v. Federal Deposit Ins. Corp.*, — U.S. ——, ——, 114 S.Ct. 2048, 2054- 56, 129 L.Ed.2d 67, 62 U.S.L.W. 4487 (1994); *Texas Indus., Inc. v. Radcliff Minerals*, 451 U.S. 630, 640-43, 101 S.Ct. 2061, 2067-68, 68 L.Ed.2d 500 (1981). If this approach is in error, the Court is confident that the error will be corrected promptly, either on interlocutory appeal or on petition for writ of certiorari. The Court will review the magistrate's recommendations de novo.

C. Analysis

This Court has no doubt that the courts of England can be every bit as impartial, learned and fair as federal and state courts located in Texas. *See Roby*, 996 F.2d at 1363; *Riley*, 969 F.2d at 958. Even though it may be true, at least as a sweeping generalization, that fair trials are available on either side of the Atlantic, the choice of forum in this case is by no means inconsequential; if it were, the issue would not be so hotly contested. The issue the Court must decide is whether it is required dismiss Leslie's action so he may refile it in England. Therefore, the Court will only address the enforceability of the Lloyd's choice-of-law clause insofar as it operates in tandem with the forum selection clause.[56] *See Mitsubishi Motors Corp. v. Soler Chrysler-*

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56. Both parties and all U.S. courts that have examined the matter appear to agree that enforcement of the Lloyd's forum-selection clause will operate "in tandem" with the Lloyd's choice-of-law clause to render any 10b-5, section 12(2), or RICO cause of action unenforceable in England. *See Bonny*, 3 F.3d at 160-61; *Roby*, 996 F.2d at 1364-65; *Riley*, 969 F.2d at 958; *Shell*, 850 F.Supp. at 622-23; see also Jennifer M. Eck, Note, Turning Back the Clock: A Judicial Return to Caveat Emptor for U.S. Investors in Foreign Markets, 19 N.C.J.Int'l L. & Comm.Reg. 313 (1994) (criticizing Bonny v. Society of Lloyd's) ("[T]he Seventh Circuit still failed ... adequately [to] address the issue of whether plaintiffs were prospectively waiving their Securities Act remedies because the court's analysis ignored the fact that remedies available in England are not substantially similar to U.S. statutory remedies."). The possibility is

Plymouth, 473 U.S. 614, 637 & n. 19, 105 S.Ct. 3346, 3359 & n. 19, 87 L.Ed.2d 444 (1985) ("We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy.") (*citing Redel's, Inc. v. General Elec. Co.*, 498 F.2d 95, 98-99 (5th Cir.1974)). The scope and effect of the Lloyd's choice-of- law clause, as it applies to the adjudication of Leslie's substantive rights in a United States court, is not an issue that requires immediate resolution. At this juncture, any such decision would be purely advisory.

United States admiralty law treats forum selection clauses as presumptively enforceable:[57]

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intriguing that English courts might recognize that "[m]odern approaches assume that ... legislative jurisdictions of different states overlap," and conclude that it is not inconsistent with English law to enforce rights based upon certain United States statutes, see Larry Kramer, Return of the Renvol, 66 N.Y.U.L.Rev. 979, 990, 991 ("The traditional theory purports to find a complete scheme for determining the parties' rights in the principle of territoriality.... But the territorial principle does not resolve cases that involve transactions or occurrences connected to several states, because applying the law of any (and none) of these states is consistent with its premise."); *see also Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 921-26 (D.C.Cir.1984) (discussing overlapping bases for national legislative jurisdiction), or even that English courts might conclude that choice-of- law or comity principles require them, in appropriate cases, to enforce legal rights grounded upon United States statutes so long as those statutory rights are not inconsistent with English public policy. *Cf. K.D.F. v. Rex*, 878 S.W.2d 589, 593-96 (Tex.1994) (discussing principles of comity concerning the enforcement of another sovereign's laws in the interstate context). However, Riley, Roby, Bonny, and Shell reinforce the conclusion that enforcement of the FS/COL clauses necessarily precludes Leslie's enforcement in England of any right arising under the 1934 Securities Exchange Act or the DTPA.

57. English law, apparently, is not far different. *See The Bremen*, 407 U.S. at 11 n. 12, 92 S.Ct. at 1914 n. 12; Ted. L. Stein, Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal, 78 AM.J.INT'L.L. 1, 21-22 (1984) (comparing United States and English law). In Texas, courts are not "bound by forum selection clauses if the interests of ... public policy strongly favor jurisdiction in a forum other than the one consented to in the contract," particularly

> [S]uch clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be "unreasonable" under the circumstances.... The choice of that forum was made in an arm's length negotiation.... There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power ... should be given full effect.... A contractual choice-of- forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision.... Courts have also suggested that a forum clause, even though it is freely bargained for and contravenes no important policy of the forum, may nevertheless be "unreasonable" and unenforceable if the chosen forum is seriously inconvenient for the trial of the action....

The Bremen, 407 U.S. at 11-16, 92 S.Ct. at 1913-16. Although the magistrate considered it important that the 1986 General Undertaking is an adhesion contract, that fact alone is not determinative.[58] *Carnival Cruise Lines*, 499 U.S. at ——, 111 S.Ct. at 1527 ("[W]e do not adopt

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when a claim arises under the DTPA. *See Greenwood v. Tillamook Country Smoker*, 857 S.W.2d 654, 656 (Tex.App.--Houston [1st Dist.] 1993), no writ); *Pozero v. Alfa Travel, Inc.*, 856 S.W.2d 243, 244-45 (Tex.App.--San Antonio 1993, no writ); *Dowling v. NADW Marketing, Inc.*, 578 S.W.2d 475, 476 (Tex.Civ.App.--Eastland 1979, writ ref'd n.r.e.); *see also DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677-78 (Tex.1990), cert. denied, 489 U.S. 1048, 111 S.Ct. 755, 112 L.Ed.2d 775 (1991); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 412, 421 (Tex.1984), cert. denied, 498 U.S. 1058, 111 S.Ct. 755, 112 L.Ed.2d 775 (1991); *First Commerce Realty Investors v. K-F Land Co.*, 617 S.W.2d 806, 807-08 (Tex.Civ.App.--Houston [14th Dist.] 1981, writ ref'd n.r.e.).

58. Lloyd's of course objects that the 1986 General Undertaking is not an adhesion contract. As a standard-form contract without negotiable terms, drafted by Lloyd's, and offered to Leslie on a take-it-or-leave-it basis, the revised General Undertaking is by definition an adhesion contract. *See Carnival Cruise Lines*, 499 U.S. at ----, 111 S.Ct. at 1527; *id. at* ----, 111 S.Ct. at 1530-31 (Stevens, J., dissenting).

the Court of Appeals' determination that a nonnegotiated forum-selection clause in a form ticket contract is never enforceable simply because it is not the subject of bargaining."). The Supreme Court in Carnival Cruise Lines recognized three policies supporting such clauses:

> First, a cruise line has an interest in limiting the fora in which it could be subject to suit.... [I]t is not unlikely that a mishap on a cruise could subject a cruise line to litigation in several different fora.... Additionally, [such] a clause ... has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended.... Finally, it stands to reason that passengers who purchase tickets containing a forum selection clause benefit in the form of reduced fares....

Id. 499 U.S. at ——, 111 S.Ct. at 1527. There is no evidence in the record that Leslie obtained any benefit in the form of reduced or refunded membership or transaction fees after executing the 1986 General Undertaking. Nor can Lloyd's make as clear a case for an interest in limiting potential fora for lawsuits. First, Lloyd's employs lawyers throughout the world in connection with its insurance business and litigates frequently outside England. Second, Lloyd's has been in operation for over three hundred years, yet Lloyd's only started using forum clauses around 1980 and only required them in 1986.

While it can be argued that few Lloyd's Names were citizens of any country other than England prior to 1970, the fact remains that the introduction of the forum-selection clause did not coincide with Lloyd's initial efforts to recruit Names outside England. Rather, Names started signing agreements containing the clauses around 1980, *see Riley*, 969 F.2d at 955, at which time Lloyd's had already recruited heavily outside England. *See supra* note 50. Therefore, the clause coincides more closely with Lloyd's efforts in Parliament to seek passage of the 1982 Lloyd's Act. Nor does it appear Lloyd's realized the need for uniformity in 1980 and promptly sought to have all foreign Names sign the revised General Undertaking. Rather, Lloyd's mandated the revised General Undertaking in 1986, just as reports

started to surface that American Names planned to sue Lloyd's, and shortly before it became impossible for Lloyd's to continue concealing the extent of its problems.

The situation of Lloyd's Names differs from the situation of cruise line passengers in another important respect. In *Carnival Cruise Lines*, 499 U.S. at ——, 111 S.Ct. at 1524, the Schuttes lived in Washington and took a cruise to Mexico. Other injured passengers could have come from Nebraska, North Dakota, Asia, or Australia. Carnival did not necessarily conduct cruise operations in all of these locations. In contrast, Lloyd's purposely came into the United States to recruit Names, and recruited Leslie in the state of his domicile. Lloyd's Names like Leslie have a much stronger interest in litigating in their domicile state than would cruise passengers like the Schuttes, injured during a cruise in a foreign land, distant from both their own domicile and Carnival's headquarters.

The only salutary effect of the Lloyd's clause, therefore, is the possibility of "dispelling confusion about where suits ... must be brought." This effect must, of course, be balanced against the effect the clause might have on Names' substantive rights. Notably, both the Roby court and the Bonny court expressed "serious concerns that Lloyd's clauses operate as a prospective waiver of statutory remedies for securities violations." *Bonny*, 3 F.3d at 160; *Roby*, 996 F.2d at 1363 ("We depart somewhat from the Riley court with respect to the fourth factor. We believe that there is a serious question whether United States public policy has been subverted by the Lloyd's clauses."). This Court finds no reason to believe this effect on Names' substantive rights was inadvertent or accidental.

1. Fraud

The 1986 General Undertaking is generally understood to operate in tandem with the 1982 Lloyd's Act to deprive Names of any common law cause of action against Lloyd's not based upon Lloyd's "bad faith," and any claim based upon United States statutory rights. *See Bonny*, 3 F.3d at 161. The Bonny court permitted dismissal of a

lawsuit in favor of an English forum only after Lloyd's "stipulated that it would not raise th[e] [Lloyd's Act qualified immunity] defense." *Id.* at 162-63. Lloyd's has not offered to make any such stipulation in this case. Even if the FS/COL clauses, in tandem with the Lloyd's Act, do not in fact operate to deprive American Names of important remedies, the federal securities laws among them, substantial evidence exists that Lloyd's did its level best to make it so. Moreover, neither Lloyd's nor Sturge disclosed important information, available to Lloyd's insiders, about asbestos and pollution risks and the "loading" of outside syndicates, before Lloyd's insisted that Leslie and other Names sign the 1986 General Undertaking. Lloyd's and Sturge never informed Leslie of the probable or intended effect of the 1986 General Undertaking on his legal rights. Rather, Sturge represented to Leslie shortly before Lloyd's issued the document that the 1982 Lloyd's Act had a beneficial effect on Names' rights and regulatory protections. In a letter discussing the 1986 documents Leslie had to sign, Sturge represented that documents contained "few variations of substance." None of the notices Leslie received even mentioned the FS/COL clauses.

The presumption that a forum-selection clause is reasonable may be overcome by a strong showing that "[Leslie's] accession to the forum clause" was obtained "by fraud or overreaching." *Carnival Cruise Lines*, 499 U.S. at ——, 111 S.Ct. at 1528; *The Bremen*, 407 U.S. at 12, 92 S.Ct. at 1914 ("fraud, undue influence, or overweening bargaining power"). The Court concludes that Leslie's accession to the forum selection clause was the product of fraud on the part of Lloyd's and Sturge. Although Leslie has dropped Sturge as a defendant, that is irrelevant in determining whether this clause is enforceable.

The Fifth Circuit recently stated:

> Texas law defines fraud as misrepresentation of a material fact with intention to induce action or inaction, [and] reliance on the misrepresentation by a person who, as a result of such reliance, suffers injury. A defendant's failure to disclose a material fact is fraudulent only if the defendant has a duty to disclose that fact. A duty to speak may arise by operation of law or by agree-

> ment of the parties. In the absence of an agreement, there must be some special relationship between the parties.... The non-disclosing party must have knowledge of the facts it withheld.

Trustees of the Northwest Laundry and Dry Cleaners Health & Welfare Trust Fund v. Burzynski, 27 F.3d 153, 157 (5th Cir.), reh'g denied, 38 F.3d 571 (5th Cir.1994), cert. denied, — U.S. ——, 115 S.Ct. 1110, 130 L.Ed.2d 1075, 63 U.S.L.W. 3625 (1995). The evidence is sufficient to support a finding that, at the time Leslie signed the revised General Undertaking, Lloyd's and Sturge both had a duty to disclose material facts to Leslie, either by agreement or a due to a special relationship. Lloyd's and Sturge engaged in misrepresentations, misleading partial disclosures, and nondisclosures of material facts in conjunction with Lloyd's announcement that Leslie was required to sign the 1986 General Undertaking. Moreover, Lloyd's directed Sturge and other Members' Agents to instruct Members, such as Leslie, that their failure to sign the 1986 General Undertaking would result in termination of their underwriting memberships. At Lloyd's behest, Sturge so informed Leslie on two occasions. If any reasonable outside Name had known what insiders at Lloyd's knew in the summer of 1986, that Name most certainly would have preferred to terminate or suspend his or her underwriting activity with Lloyd's. Nevertheless, Leslie signed the General Undertaking, as Lloyd's intended, in reliance upon representations and reassurances by Lloyd's and its agent, Sturge. Leslie has suffered injury because the 1986 General Undertaking, if enforced, limits his substantive rights to sue for deceptive trade practices and securities fraud.

Leslie's reliance on Lloyd's representations was not reasonable. Leslie was a graduate of the University of Texas Law School and a sophisticated businessman. A cursory reading of the 1986 General Undertaking would have revealed that it contained the FS/COL clauses. Leslie certainly was capable of investigating the provisions of the Lloyd's Act. However, Texas law does not require proof that Leslie's reliance on representations and nondisclosures by Lloyd's and Sturge was reasonable. *Martin v. MBank El Paso, N.A.*, 947 F.2d 1278, 1281 (5th Cir.1991); *Koral Indus. v. Security-*

Connecticut Life Ins. Co., 802 S.W.2d 650, 651 (Tex.1990) (per curiam) ("Failure to use due diligence to suspect or discover someone's fraud will not act to bar the defense of fraud to the contract."). Therefore, Lloyd's and Sturge obtained Leslie's accession to the forum selection clause by fraud.

2. Overreaching

Even if the forum selection clause was not obtained by fraud, it was the product of overreaching. The plaintiffs in *Carnival Cruise Lines*, 499 U.S. at ——, 111 S.Ct. at 1528 (emphasis added) "were given notice of the forum provision and, therefore, presumably retained the option of rejecting the contract with impunity." Likewise, every other Lloyd's Name who has sued in the United States signed a General Undertaking containing the FS/COL clauses "in an arm's length negotiation," *The Bremen*, 407 U.S. at 12, 92 S.Ct. at 1914, because they signed before becoming Names—not when they had already been Names for nearly a decade.

Lloyd's was the named beneficiary of a clean, irrevocable letter of credit Leslie had posted with Texas Commerce Bank, with a face amount exceeding $100,000. Lloyd's clearly instructed Leslie that the 1986 General Undertaking was a take-it-or-leave-it offer: He had the choice of signing it or terminating his underwriting membership. Leslie's accession to the 1986 General Undertaking was certainly not an "arm's length" transaction which Leslie had the option of rejecting with impunity.

3. Public policy

Other courts examining the public policy issue have reasoned that the waiver effect of the 1986 General Undertaking does not violate United States public policy because United States Names can sue in England for common-law fraud, relief under the Misrepresentation Act, or for breach of contractual duties. However, the 1986 General Undertaking violates public policy in this case because it effectively waives Leslie's rights under the Texas Deceptive Trade Practices—

Consumer Protection Act. Moreover, this Court would argue that Riley, Roby, Bonny, and Shell are wrongly reasoned. Because the General Undertaking operates as both a prospective waiver of the United States securities laws and a waiver of unknown securities fraud claims, it violates public policy.

The Roby and Bonny courts reasoned that English law provides remedies that are good enough to serve the goal of deterring fraud and misleading nondisclosures in securities transactions, even though United States securities fraud remedies are unavailable in England. However, the Rule 10b-5 remedy is significantly more powerful, and reaches a broader range of manipulative or deceptive devices "in connection with the purchase or sale of a security," than common-law fraud—including, for example, "churning," "scalping," and trading on pre-publication knowledge of the contents of newspaper reports. See supra note 42. It is not at all apparent that common-law remedies alone are equivalent to Rule 10b-5 for the purpose of addressing the "loading" of insurance syndicates; nor is it evident that English law provides a fully adequate remedy. Congress has expressly legislated against waivers involving securities fraud remedies. 15 U.S.C. §§ 77n, 78cc. "In dealing with federal securities, the general rule is that unknown or subsequently maturing causes of action may not be waived " *Petro-Ventures, Inc. v. Takessian*, 967 F.2d 1337, 1340-42 (5th Cir.1992) (emphasis added).

> Notwithstanding the provisions of the securities laws expressly voiding any private agreement waiving compliance with provisions of the laws, settlements of claims arising from acts which are violations of the securities laws are not void as a matter of law, at least where such settlement agreements do not themselves continue the precise conduct which violates the laws. But judicial hostility toward waivers of statutory rights requires that the right to private suit extended by the securities laws for alleged violations be scrupulously preserved against unintentional or involuntary relinquishment.... Waiver by subsequent conduct that does not take the form of a settlement, is against the policy of the securities laws.

Mbank Fort Worth, N.A. v. Trans Meridian, Inc., 820 F.2d 716, 725-26 (5th Cir.) (emphasis added) (*quoting Murtagh v. University Computing Co.*, 490 F.2d 810 (5th Cir.1974), cert. denied, 419 U.S. 835 (1974)), reh'g denied, 826 F.2d 391 (5th Cir.1987). The public policy against waivers of securities law remedies is not satisfied merely by the availability of some remotely similar common law or statutory misrepresentation remedy; subject to limited exceptions, such as voluntary settlements, the 1933 and 1934 Acts require that all such waivers are void.

Even if public policy is satisfied by the availability of a common law "bad faith" or fraud remedy for securities violations, the 1986 General Undertaking violates public policy because it operates as a waiver of Leslie's DTPA rights. "The DTPA does not represent a codification of the common law. A primary purpose of the DTPA is to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit." *Bank One, Texas, N.A.*, 970 F.2d at 28; *Eagle Properties Ltd.*, 807 S.W.2d at 724; *Alvarado*, 749 S.W.2d at 48; *Smith*, 611 S.W.2d at 616 (emphasis added). A waiver of Leslie's DTPA rights may not be enforced unless Lloyd's pleads and proves (1) Leslie was not in a significantly disparate bargaining position, (2) Leslie was represented by legal counsel, (3) the transaction involved consideration in excess of $500,000, (4) the waver was made in an express provision, (5) in a written contract, and (6) signed by both Leslie and Leslie's counsel. Tex.Bus. & Com.Code Ann. § 17.42 (Vernon 1987 & Supp.1995). Anything less is "contrary to public policy and is unenforceable and void." Id. Therefore, the Court is not required to enforce the forum selection clause in Lloyd's 1986 General Undertaking as it applies to Robert Leslie.

VII. COMITY

Lloyd's argues that principles of international comity "require this Court to stay its hand to require Leslie to resolve this dispute in England." Dkt. # 5, at 19-21. Reviewing the magistrate's recommendation de novo, the Court is of the opinion that international

comity neither requires it to refrain from exercising personal jurisdiction over Lloyd's nor requires it to refrain from exercising subject-matter jurisdiction under the 1934 Securities Exchange Act and the DTPA. The magistrate's recommendation should therefore be affirmed.

Concerning personal jurisdiction, Lloyd's interest in having disputes concerning its transactions with American Names resolved in English courts is apparent—but the Court cannot fathom what interest English courts might have in adjudicating claims concerning an English defendant's activities in the United States. Aside from a rather peculiar internal structure, Lloyd's is no different from any other English business entity and should reasonably anticipate subjecting itself to personal jurisdiction in foreign courts when it does business abroad. Even if Lloyd's U.S. transactions had been conducted by the English sovereign, there would still in all probability be a basis for personal jurisdiction under the principle of restrictive sovereign immunity. *See Republic of Argentina*, 504 U.S. at ——, 112 S.Ct. at 2167-69. Surely English business entities are not entitled to treatment more favorable than their own sovereign. Thus, comity provides no basis for this Court to decline to exercise personal jurisdiction.

Concerning subject matter jurisdiction, the Court finds instructive the recent discussion in *Hartford Fire Ins. Co.*, 509 U.S. 764, 113 S.Ct. 2891:

> Finally, we take up the question whether certain claims against the London reinsurers should have been dismissed as improper applications of the Sherman Act to foreign conduct.... At the outset, we note that the District Court undoubtedly had jurisdiction of these Sherman Act claims, as the London reinsurers apparently concede.... According to the London reinsurers, the District Court should have declined to exercise such [subject-matter] jurisdiction under the principle of international comity. The Court of Appeals agreed that courts should look to that principle.... This availed the London reinsurers nothing, however....When it enacted the Foreign

> Trade Antitrust Improvements Act of 1982 ... Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity.... We need not decide that question here, however, for even assuming that in a proper case a court may decline to exercise Sherman Act jurisdiction over foreign conduct ... international comity would not counsel against exercising jurisdiction here. The only substantial question is whether "there is in fact a true conflict between domestic and foreign law." ... The London reinsurers contend that applying the Act to their conduct would conflict significantly with British law, and the British Government, appearing before us as amicus curiae concurs. They assert that ... the conduct alleged here was perfectly consistent with British law and policy. But this is not to state a conflict. "[T]he fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws," even where the foreign state has a strong policy to permit or encourage such conduct.... Since the London reinsurers do not argue the British law requires them to act in some fashion prohibited by the law of the United States ... or claim that their compliance with the laws of both countries is otherwise impossible, we see no conflict with British law.

Id., 509 U.S. at ——, 113 S.Ct. at 2909-11 (emphasis added).[59] English law, by permitting Lloyd's to self-regulate, may or may not permit Lloyd's to engage in manipulative or deceptive practices and non-

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59. As mentioned above, see supra note 45, the English Parliament has passed a specific act to counter extraterritorial application of the Sherman Act, including a "clawback" provision to counter treble damage awards. The Supreme Court in Hartford Fire Ins. Co. nevertheless held that international comity would not require United States courts to refrain from exercising Sherman Act jurisdiction. Lloyd's has not directed the Court's attention to any comparable English legislation intended to counter application of United States securities and consumer protection laws to English businesses conducting transactions in the United States.

disclosures in its dealings with Names. However, the Court is unaware of any provision of English law which requires Lloyd's and its Members' Agents to do so. Nor does it appear that permission for Lloyd's to engage in deceptive business practices and securities fraud, if Lloyd's in fact has such permission, furthers any legitimate interest or policy of the English government. Indeed, the analysis in *Bonny*, 3 F.3d at 159-62, and *Roby*, 996 F.2d at 1363-1366, indicates that English law treats fraudulent and deceptive business practices with disfavor. Thus, enforcement by United States courts of the United States securities and consumer protection laws against English defendants doing business with United States citizens in the United States, far from generating an irreconcilable conflict with the requirements and prohibitions of English law, tends to promote the underlying policies reflected in English law, as well as United States policies and interests. Lloyd's compliance with both English and American law, in its transactions with United States Names, is by no means "impossible," *see Hartford*, at ——, 113 S.Ct. at 2911, and certainly does not create a "true conflict," *id.* at ——, 113 S.Ct. at 2910, such that international comity would require this court to decline to exercise subject matter jurisdiction under the 1934 Act and the DTPA.

VIII. FORUM NON CONVENIENS

Finally, Lloyd's contends that Houston is an inconvenient forum for this litigation, compared with London. After considering the relevant factors, the magistrate concluded that Leslie's action should not be dismissed on forum non conveniens grounds.

> [A] plaintiff's choice of forum should rarely be disturbed. However, when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would "establish ... oppressiveness and vexation to a defendant ... out of all proportion to the plaintiff's convenience," or when the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems," the court may, in the exercise of its sound discretion, dismiss the case.

Piper Aircraft Co. v. Reyno, 454 U.S. 235, 242, 102 S.Ct. 252, 258, 70 L.Ed.2d 419 (1981) (*quoting from Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524, 67 S.Ct. 828, 843, 91 L.Ed.2d 1067 (1947)); cf. *id.* at 249, 102 S.Ct. at 262 ("Similarly in Koster, the Court rejected the contention that where a trial would involve inquiry into the internal affairs of a foreign corporation, dismissal was always appropriate."); see also Tex.Civ.Prac. & Rem.Code Ann. § 71.051(b) (Vernon Supp.1995). In this case, unlike Piper Aircraft Co., the plaintiff is a United States citizen, who resides in the state and district of the court in which he filed suit. *Piper Aircraft Co.*, 454 U.S. at 255-56, 102 S.Ct. at 266; see also Tex.Civ.Prac. & Rem.Code Ann. § 71.051(f)(1), (2) (Vernon Supp.1995).[60] Therefore, the Court is precluded from weakening the presumption in Leslie's favor.

The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference. *Piper Aircraft Co.*, 454 U.S. at 257, 102 S.Ct. at 266. The standard of review that applies when a trial court reviews the determinations of a magistrate is unclear; out of an abundance of caution, however, the Court shall review the magistrate's ruling de novo. Dkt. # 43, at 15-17. The magistrate considered: (1) the applicable law, (2) sources of proof, (3) access to witnesses, (4) relative ease to the parties of conducting litigation in a foreign country, (5) potential conflict of laws problems, (6) likelihood that the defendant's misconduct in the United States will be repeated, and (7) access to a forum providing full and complete redress of wrongs.

The Court is of the opinion that the magistrate's reasoning was largely correct, and adopts as its own all but one of her findings. It is

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60. The Texas forum non conveniens statute applies only to personal injury or death actions filed in state court after September 1, 1993. Therefore, it is not controlling in this case.

not true that a United States court trying this case can avoid difficult issues concerning choice-of-law and the substantive standards of English law. However, an English court would necessarily face difficult problems involving comity, choice-of-law, and the potential application of complex and unfamiliar United States statutes—problems it could only avoid by ignoring altogether both United States law and the legal rights of a United States citizen to the extent his rights depend upon the securities and consumer protection statutes. Moreover, a court sitting in the United States should not be overwhelmed by the possibility of referring to English common law, or even to the English statutes likely to apply in the present dispute. The relevant factor is "the avoidance of unnecessary problems in the conflict of laws," *see Piper Aircraft Co.*, 454 U.S. at 241 n. 6, 102 S.Ct. at 258 n. 6, and the Court is of the opinion that such problems, if any, necessarily arise in this case, and cannot in fairness be avoided simply by dismissing this action in favor of an English forum. This Court is willing, and duty bound, to address and resolve such issues as they arise. Considering the totality of circumstances, this ground is not sufficient to warrant denying Leslie access to his chosen forum.

A more difficult administrative problem the magistrate did not address is Leslie's ability to collect a judgment in the event he prevails with his claim in a United States court. England and the United States are not parties to any treaty providing for the reciprocal enforcement of judgments. However, it would appear that Lloyd's does a considerable volume of business in the United States, *see supra* note 52, and that Lloyd's maintains accounts in the United States. Continued unimpeded access to the income stream from United States premiums would appear to be an asset of significant value to Lloyd's. Because the judgments of the United States District Courts are entitled to full faith and credit throughout the United States, U.S. Const., art. 4, § 1; 28 U.S.C. § 1738; *In re Humphreys*, 880 S.W.2d 402, 405 (Tex.), cert. denied, 513 U.S. 964, 115 S.Ct. 427, 130 L.Ed.2d 340 (1994); *see also Migra v. Warden City Sch. Dist. Bd. of Ed.*, 465 U.S. 75, 80-82, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984); *Daniels v. Equitable Life Assurance Soc'y of the U.S.*, 35 F.3d 210, 213 (5th Cir.1994) (discussing 28 U.S.C. § 1738 in context of issue preclusive effect of

state court judgments in federal court), the Court anticipates Leslie could collect any judgment in his favor without intervention from English courts.

One final factor the Court must consider is the length of time this action has been pending in Houston, Texas. The Court has already conducted extensive evidentiary hearings and developed considerable familiarity with both the legal issues and the facts in this case. While dismissal would probably serve the administrative convenience of an individual judge, it would promote neither justice nor the collective administrative efficiency of English and American judicial systems. Nor would it advance the combined interest of the litigants in prompt and fair resolution of their dispute. Forcing the parties to start again in England, and transferring the burden of this litigation to the docket of some judge in England, would seem counterproductive from the standpoint of the public and private factors listed in Piper.

After weighing the public and private factors listed above, and all remaining factors listed in *Piper Aircraft Co.*, 454 U.S. at 241 n. 6, 102 S.Ct. at 258 n. 6, the Court in its discretion declines to dismiss this litigation on forum non conveniens grounds.

IX. INTERLOCUTORY APPEAL

In the event this Court affirms the magistrate's recommendations on rehearing, Lloyd's has requested interlocutory review by the Fifth Circuit. 28 U.S.C. § 1292(b). This order involves several controlling questions of law. Because the Second, Seventh, and Tenth Circuits have either approached or resolved one or more of these issues differently, it would appear there exists a substantial ground for difference of opinion. The Court is of the opinion that an immediate appeal will materially advance the ultimate termination of this litigation—if it remains in the United States, by narrowing and clarifying crucial legal issues, some of which are issues of first impression. The Court therefore deems it appropriate to certify this order for appeal under the authority of 28 U.S.C. § 1292(b). Lloyd's motion for new trial and its motion for findings of fact and conclusions of law are not appropriate at this juncture and should be DENIED.

X. CONCLUSION

For the reasons stated above, Lloyd's motion to reconsider (Dkt. # 50, et seq.) is GRANTED; the memorandum and recommendation of the magistrate (Dkt. # 43), upon reconsideration, is hereby AFFIRMED; Lloyd's motion and supplemental motions to dismiss (Dkt. nos. 54, 65, et seq.) are hereby DENIED; Lloyd's motion for interlocutory appeal (Dkt. # 50) is GRANTED; and any other motions by Lloyd's, including Lloyd's motion for new trial and Lloyd's motion for findings of fact and conclusions of law (Dkt. # 50), are DENIED. It is so ORDERED.

APPENDIX C

Not Reported in F.Supp.
(Cite as: 1994 WL 873350 (S.D.Tex.))

Charles Robert LESLIE, Plaintiff,
v.
LLOYD'S OF LONDON, a/k/a Lloyd's, a/k/a the Corporation of Lloyd's a/k/a the
Committee of Lloyd's a/k/a the Society of Lloyd's, and R. W. Sturge & Co.,
a/k/a R. W. Sturge Ltd., Defendants.

Civ. A. No. H-90-1907.

United States District Court, S.D. Texas, Houston Division.

Nov. 2, 1994.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

RAINEY, District Judge.

Currently pending before the Court is the Motion for Preliminary Injunction[1] (Docket Entry #3) filed by Plaintiff Charles Robert Leslie ("Leslie"). After considering this motion, the pleadings, briefs, oral argument, evidence and testimony presented in regard to this motion, the Court makes the following findings of fact and conclusions of law. As an initial matter, however, the Court finds that a brief discussion of the procedural background relative to Leslie's motion is in order.

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1. Formally captioned "Plaintiff's Verified Motion to Extend Temporary Restraining Order and for Preliminary Injunction".

PROCEDURAL BACKGROUND

Leslie moves this Court to enjoin Defendant Lloyd's of London, a/k/a Lloyd's, a/k/a The Corporation of Lloyd's, a/k/a The Committee of Lloyd's, a/k/a The Society of Lloyd's ("Lloyd's") from presenting for payment Leslie's clean irrevocable letter of credit, referred to in this action as both "I-000030" and "TCB 30" (hereinafter, the "Letter of Credit"), payable to The Committee of Lloyd's in the amount of approximately $180,000.00.[2]

Leslie first obtained an ex parte temporary restraining order against Texas Commerce Bank, N.A., ("TCB"), the bank issuing the Letter of Credit, in a state district court action on March 28, 1994. That order restrained TCB from paying the Letter of Credit. On April 4, 1994, Leslie obtained an additional ex parte order restraining the confirming bank, Chemical Bank[3], from paying the Letter of Credit and restraining Lloyd's from presenting the Letter of Credit for payment.

TCB removed the state court action to this Court on April 5, 1994, and the case was filed under Civil Action No. H-94-1148 ("H-94-1148"); however, the events prompting the filing of Leslie's request for injunctive relief stem from the circumstances giving rise to Civil Action No. H-90-1907 ("H-90-1907"), also filed with this Court. In H-90-1907, Leslie seeks recovery of damages against Lloyd's pursuant to the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"), TEX.BUS.& COM.CODE ANN. § 17.41, et seq., actual and punitive damages at common law for breach of fiduciary duty, and statutory damages pursuant to § 10(b) of the 1934 Securities and Exchange Act, 15 U.S.C. § 78j and Rule 10b-5 of the Securities Exchange Commission. Because of the overlap of the parties, claims and issues presented

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2. Defendant R. W. Sturge & Co., a/k/a R. W. Sturge Ltd. ("Sturge") was dismissed by Leslie on May 3, 1994 (Docket Entry #108).

3. A confirming bank agrees to either honor a credit issued by another bank or guarantees that the issuer or another bank will honor it. TEX.BUS.& COM.CODE § 5.103(a)(6).

in both cases, this Court consolidated the two cases into the senior civil action, H-90-1907. The Court concurrently extended the temporary restraining order granted in state court against TCB to April 21, 1994 and against Chemical Bank and Lloyd's to April 25, 1994. The parties subsequently agreed to allow the temporary restraining orders to expire as to Chemical Bank and TCB. This Court then held a hearing on Leslie's Motion for Preliminary Injunction against Lloyd's on April 25, 1994 and continued the hearing on May 9, 1994.

Although this Court is currently considering all of the claims asserted in H- 90-1907, the following findings of fact and conclusions of law are entered solely in regard to the issue of Leslie's Motion for Preliminary Injunction.

FINDINGS OF FACT

1. Leslie is an individual residing in Houston, Texas. In the Spring of 1976, a director of Sturge[4], Charles E. Parnell ("Parnell") solicited Leslie for participation in an investment contract to underwrite insurance risks through Lloyd's. Participation required that Leslie apply and qualify for membership in Lloyd's which included posting a letter of credit in Lloyd's favor through a Texas bank. Leslie was also required to accept liability to the entire extent of his personal estate. Leslie completed this process by January 1, 1977 and traveled to London to execute certain necessary documents. At that time he became an underwriting member or "Name".

2. The Letter of Credit posted by Leslie was payable on demand to either The Committee of Lloyd's or the Society and Counsel of Lloyd's for the purpose of securing Leslie's obligations to the various syndicates in which he participated as an underwriter.

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4. Sturge is a syndicate managing agency and members agent operating on behalf of both Lloyd's syndicates and Lloyd's members or "Names".

3. As a Name, Leslie was required to enter into an underwriting agency agreement through which he would participate in syndicates. The syndicates, regulated by Lloyd's, assess risks and sell policies and contracts of insurance which Lloyd's ultimately approves and issues. Leslie entered into an underwriting agency agreement with Sturge. Sturge arranged for Leslie to participate in six syndicates managed by Sturge, and three others managed by R. H. M. Outhwaite and Posgate & Denby Agencies Limited.

4. Leslie has periodically increased and renewed his initial Letter of Credit. As mentioned previously, currently outstanding is the Letter of Credit issued by TCB and made payable to The Committee of Lloyd's in an amount approximating $180,000.00.

5. During the time Leslie was considering becoming a Name, Parnell represented to him that membership in Lloyd's was a sound and attractive investment and that Leslie's underwriting involvement would be focused on low-risk insurance. Parnell further indicated that Leslie could limit his risk by simply resigning from a syndicate after the close of its three-year accounting period. Parnell warned Leslie that, as a Name, he would have unlimited liability; however, Parnell also reassured Leslie that the risk was negligible and nothing more than a technical requirement. In response to his direct question, Leslie was told that the most he could actually expect to lose in a bad year was approximately 10 percent.

6. The representations made to Leslie that he resign his underwriting membership after three years without any real fear of further liability proved to be a false statement of Leslie's obligations as a Name. Sturge director Nigel Hanbury admitted to Leslie in April 1989 that although he could "resign" from a syndicate, his liabilities continue indefinitely as long as he is a Name in syndicates with open year accounts.

7. Syndicates generally close for underwriting purposes after three years; however, long-tail coverages and liabilities prevented some syndicates from closing claims for indeterminate periods. At the time

he became a Name, Leslie was placed into syndicates in Lloyd's that contained high-risk, long-tail claims exposure, such as asbestosis and other pollution risks. Accordingly, Leslie, like numerous other Names, is faced with limitless, continuing liability -- a consequence clearly contrary to the representations used to entice Leslie to invest. Leslie asserts that he would never have become a Name at Lloyd's had he been informed of this situation in 1976.

8. At the preliminary injunction hearing, Leslie called five other Names as witnesses. All five witnesses testified that similar representations were made to them regarding membership at Lloyd's.[5]

9. As of 1989, Lloyd's was not disclosing pertinent information regarding the asbestos risks and was instead representing to Names that "unlimited liability" was a "technicality", in spite of the information Lloyd's then had regarding asbestos claims.

10. During 1989-90, at the same time that Lloyd's first informed Leslie that, in fact, he could not effectively "resign" from Lloyd's, a Sturge representative told Willa Martin of Albuquerque, New Mexico, that she could resign after three years. Lloyd's later encouraged the Martins to increase their underwriting limits despite Lloyd's knowledge of the hidden risks and without any disclosure of these risks.

11. In fact, by 1986, Lloyd's had knowledge of potentially staggering losses already incurred, but not yet reported and not yet attributable to any particular Lloyd's syndicates, for asbestosis and other pollution claims. Furthermore, during the same time period, Lloyd's had extensive knowledge that many syndicates were grossly under-reserved given the magnitude of these impending asbestosis claims. In particular, the Court notes the following:

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5. This testimony was presented both in the form of live testimony and deposition excerpts.

a. In 1969, the Cromer Report noted that many syndicates were under-reserved because the extent of losses was not fully appreciated and that those losses were passed on in later years to other syndicates through the reinsurance-to- close mechanism. This information was not made available to Leslie at the time he was solicited to become a Name. In fact, the Cromer Report itself was not made available to Names until October 1986, almost 17 years after its submission to The Committee of Lloyd's.

b. The Cromer Report also cautioned that Lloyd's syndicates were particularly unsuitable for the underwriting of a catastrophe business as compared to corporate reinsurers, who could accumulate reserves in a tax-effective manner. Lloyd's was advised that it was in need of a special fund to deal with catastrophes. This advice was based upon the size of Lloyd's North American business and the number of catastrophic claims filed in North America; the fact that much of its business was the reinsurance of catastrophe risks; the inadequate size of its available reserves; and in view of the presumption that surpluses would be distributed to Names.

c. Throughout the 1970's and 1980's, Lloyd's sought to enlarge its underwriting membership. In particular, Lloyd's embarked upon a campaign to attract new Names from the United States and Canada. The recruitment drive was, in part, in response to recommendations in the Cromer Report that Lloyd should increase its membership of Names to increase its capacity in the industry. Membership rose from 1970 to 1986; however, there was no corresponding rise in underwriting. The apparent effect was a transfer of exposure to various volatile risks from insiders to external Names.

d. By at least 1980, Lloyd's had recognized the scale of the asbestosis problem as having serious implications for Lloyd's on a market-wide basis and potential implications for the solvency of the market as a whole. Lloyd's therefore set up an

Asbestos Working Party to consider and advise upon appropriate action to be taken in a coordinated approach to respond to the asbestos problem. The Asbestos Working Party met several times and gathered a variety of information and reports.

e. Between 1979 and 1981, Lloyd's American lawyers were continually advising Lloyd's of the growing asbestosis risks.

f. By letters dated February 10 and June 9, 1981, Lloyd's and the Asbestos Working Party wrote to all active underwriters, advising them to obtain as much information as possible about developments in the United States regarding asbestosis litigation. In this regard, Lloyd's wrote "[i]t cannot be emphasized too strongly that you should make yourself aware of the contents of these reports." Nevertheless, Lloyd's did not require the managing agents or members agents to inform passive Names such as Leslie of the widespread growth of asbestosis litigation.

g. As of November 1981, Lloyd's Advisory Panel of Auditors began to address the asbestos problem in preparation for the year-end 1981 audit. The Advisory Panel of Auditors consisted of the auditors specifically approved and authorized by Lloyd's to prepare the audit reports for the syndicates. At a meeting of Lloyd's panel auditors on November 10, 1981, chaired by R.J. Kiln ("Kiln"), Kiln indicated that he did not wish to see mention of certain asbestosis claims in the audit instructions. The audit instructions are issued by Lloyd's to the auditors for the auditors' use in evaluating the premium and reserves necessary to reinsure and close syndicates.

h. According to notes taken at the November 10, 1981 meeting of Lloyd's Panel Auditors, some members of the Panel felt that a warning letter on the asbestosis subject would be beneficial and that the letter should emphasize how serious the losses would be. Murray Lawrence, the Co-Deputy Chairman of Lloyd's and a member of The Committee of Lloyd's, warned

that the scale of losses might be sufficient to bankrupt the reinsurers.

l. Nonetheless, at Kiln's direction, the asbestosis claims were not mentioned in the audit instructions. The exclusion of the asbestosis claims from the audit instructions strongly indicates that Lloyd's forwarded past liabilities to new syndicates without disclosure to the Names. This omission is further indicative of Lloyd's efforts to hide the asbestosis problem.

j. By letter dated February 24, 1982, Neville Russell, the auditor for a number of syndicates, recommended that the 1979 year should not, in the exercise of reasonable care, be closed because of the inability to quantify the claims to be expected. The Neville Russell letter recognized the wide-spread nature of the asbestos problem in the insurance market and the fact that a substantial proportion of Lloyd's syndicate clients had such losses or potential losses, arising from asbestosis and related diseases, that they would be unable to quantify their final liability with any reasonable degree of accuracy.

k. On March 9, 1982, members of Lloyd's Audit Committee, Asbestos Working Party, and Lloyd's Underwriting Agents and Audit Department met to discuss the Neville Russell letter. Specifically discussed was the issue of liability quantification and the fact that Names could still be asked to put up substantial sums of money.

l. Lloyd's eventually wrote all active underwriters and underwriting agents on March 18, 1982, leaving it to each managing agent to determine whether to close their syndicates and whether to inform the Names; however, they were not required to do so. Names, including Leslie, continued to invest without adequate notice of the exposure.

12. None of the above-mentioned information that was available to Lloyd's was disclosed to Leslie when he became an underwrit-

ing member or at the time he made annual decisions to continue underwriting at Lloyd's. Nor was such information made available to him when he selected the particular syndicates in which he would be underwriting and the amount of such underwriting.

13. In a June 1985 statement to the members of Lloyd's, the Chairman of Lloyd's Counsel, Peter Miller ("Miller"), reassured Names that recent reforms reduced the likelihood of scandals that had produced the need for reform. He stated his belief that the new regulatory system instituted by Lloyd's is "one in which the current members of Lloyd's and those seeking membership can fully place their trust". He described the new regulatory scheme as a compelling reason to participate in the insurance market, and he further claimed that Lloyd's is "insisting upon very full disclosure" in connection with the accountability of agents to Names. Importantly, these statements were made to members of Lloyd's at a time when Lloyd's was aware of the asbestos risks heretofore described.

14. In June 1986, Lloyd's sent Leslie a new General Undertaking agreement to replace the original 1977 contract between the parties. The 1986 General Undertaking was part of Lloyd's new regulatory scheme, and it contained choice-of-law and forum-selection clauses that were not included within the original 1977 contract.

15. Neither Lloyd's nor Sturge provided to Leslie any sufficient explanation of the reasons for or the effect of the new General Undertaking. Sturge did send Leslie a letter on March 10, 1986 to inform him of the important changes in membership requirements and procedures and to explain the "consequential changes" Sturge would be introducing; however, the purported forum- selection/choice of law clauses were not mentioned in this letter.

16. In regard to the new General Undertaking, Sturge indicated that all Names were required to accede to the modifications and terms of the General Undertaking as a condition of continuing right of membership in Lloyd's.

17. According to Leslie's allegations, he believed that he was required to sign the 1986 General Undertaking if he was to continue his underwriting activity with Lloyd's, and he further believed that Lloyd's would call his Letter of Credit if he did not.

18. The choice-of-law and forum-selection clauses contained in the 1986 General Undertaking contract designate England as the place and English law as the means for settling disputes "arising out of or relating to the members' membership." The initial inclusion of these clauses apparently coincided with the Lloyd's awareness of the potential for massive litigation involving Lloyd's Names in the United States wherein the American Names sought to invoke United States' laws.

19. When the 1986 General Undertaking was sent to Leslie, four syndicate years of account on which he had underwritten remained open beyond the normal three- year period.

20. As a Name, Leslie received returns from his first eight years through the underwriting year 1984. Thereafter, he has incurred substantial losses. As long as he is a Name on the four syndicate years of account that remain open, Leslie is subject to lingering and unquantifiable liability, which is potentially unlimited.

21. Leslie has refused to pay in regard to calls for losses from various syndicates in which he has participated as a Name. He has instead filed a lawsuit, H-90-1907, against Lloyd's, asserting the various claims previously mentioned. Because of Leslie's refusal to pay, Lloyd's claims that it has the contractual right to draw down his Letter of Credit and forward the funds to the syndicates that have issued calls to Leslie. Lloyd's informed Leslie no later than February 11, 1994, that it intends to proceed with the compulsory drawdown on the complete amount of the Letter of Credit at the earliest possible date.

21. Lloyd's is presently solvent according to its 1993 Report of Account, and it is an on-going business. Leslie has presented speculative testimony that Lloyd's may not have sufficient assets to pay a future judgment in Leslie's favor if Leslie and other similarly situated

Names are successful in law suits against Lloyd's; however, Leslie has not established that Lloyd's is presently insolvent nor has he presented competent evidence that Lloyd's could not pay a judgment for monetary damages in Leslie's favor in this action.

CONCLUSIONS OF LAW

1. To enjoin the operation of a letter of credit, Leslie must prove the following:

a. a substantial threat he will suffer irreparable injury and will not have an adequate remedy at law if the injunction is not issued;

b. that the threatened injury to him outweighs any damage the injunction might cause to innocent third parties;

c. that the injunction will not disserve the public interest; and

d. a substantial likelihood of success on the merits.

Doe v. Duncanville Independent School District, 994 F.2d 160, 163 (5th Cir. 1993); *Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993); *Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384, 386 (5th Cir. 1984).

2. In addition to these traditional common law requirements, other courts contemplating letters of credit have required that a plaintiff prove "fraud in the transaction" as a prerequisite to obtaining such injunctive relief. *See Ground Air Transfer, Inc. v. Westates Airlines, Inc.*, 899 F.2d 1269, 1273 (1st Cir. 1990); *Airline Reporting Corp. v. First Nat'l Bank of Holly Hill*, 832 F.2d 823, 827 (4th Cir. 1987); *KMW Int'l v. Chase Manhattan Bank, N.A.*, 606 F.2d 10, 16 (2nd Cir. 1979); *Phillipp Bros., Inc. v. Oil Country Specialists, Ltd.*, 787 S.W.2d 38, 40 (Tex. 1990); *Gatx Leasing Corp. v. DBM Drilling Corp..*, 657 S.W.2d 178, 182 (Tex.App.--San Antonio 1983, no writ). See also TEX.BUS.& COM.CODE § 5.114(b) (allows a "court of appropriate jurisdiction" to enjoin payment under a letter of credit in "fraud in the transaction" fact patterns).

3. "Fraud in the transaction" has been interpreted to mean "fraud in which the wrong doing of the beneficiary has so vitiated the entire transaction that the legitimate purposes of the independence of the issuer's obligation would no longer be served". *GATX Leasing Corp.*, 657 S.W.2d at 182 (*quoting Intraword Industries, Inc. v. Girard Trust Bank*, 461 Pa. 343, 336 A.2d 316, 324-25 (1975). *See also Phillip Bros., Inc. v. Oil Country Specialists, Ltd.*, 787 S.W.2d at 40. The underlying transaction must have been a complete sham, from which no value was derived by the customer and with no purpose other than obtaining the customer's money through the letter of credit. *See GATX Leasing Corp.*, 657 S.W.2d at 183. *See also Sztejn v. J. Henry Schroder Banking Corp.*, 177 Misc. 719, 31 N.Y.S.2d 631, 634-35 (1941) (cited as leading case on the injunction of letters of credit due to fraud by *GATX Leasing Corp.*, 657 S.W.2d at 183). Furthermore, proof of actionable fraud has been held insufficient to justify an injunction. *See Paris Sav. & Loan Ass'n v. Walden*, 730 S.W.2d 355, 365 (Tex.app.--Dallas 1987, writ dism'd)("We do not hold there is no actionable fraud in either transaction. We hold only that there is no 'fraud in the transaction' of the type required to fall within section 5.114(b)").

4. Leslie has failed to show the type of fraud in the underlying transaction that would destroy the legitimate purpose of the independent Letter of Credit. Leslie is a sophisticated investor who knowingly undertook the risks inherent in causing the issuance of a letter of credit in return for the rewards of international business. *See Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 474 (5th Cir. 1985). The evidence indicates that he has sustained substantial losses as a Lloyd's Name and will no doubt continue to incur further losses; however, Leslie admitted that he derived value from his membership in Lloyd's for several years, both in earning overall profits and in using profits from certain syndicates to offset losses from unprofitable syndicates. Furthermore, the great weight of the evidence presented by Leslie indicates potentially fraudulent actions on the part of Lloyd's subsequent to Leslie's solicitation as a Name and the initial posting of the Letter of Credit. The evidence simply does not support a finding that Lloyd's did not intend for Leslie to benefit at all from the transaction underlying the Letter of Credit. This is not to say that there

exists no actionable fraud on the part of Lloyd's; rather, the Court finds that Leslie has failed to establish the "fraud in the transaction" requirement necessary to enjoin the Letter of Credit.

5. In considering whether to grant or deny preliminary injunctive relief, a district court "must remember that a preliminary injunction is an extraordinary and drastic remedy". *Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir. 1985)(*quoting Canal Authority v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974)). Accordingly, the movant bears a heavy burden of persuading the court that all the requisite elements are satisfied. *Id.* If the movant does not succeed in carrying its burden on any one of the four prerequisites, a preliminary injunction may not be issued. *Id.*

6. Leslie has failed to establish that, absent an injunction, irreparable injury will result. An injury is "irreparable" only where it cannot be undone through monetary remedies." *Enterprise*, 762 F.2d at 472; *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981); *Spiegel v. City of Houston*, 636 F.2d 997 (5th Cir. 1981). *See also Interox America v. PPG Indus., Inc.*, 736 F.2d 194, 202 (5th Cir. 1984). Applying these principles to the present case, this Court finds that it would be improper to enjoin the presentment and honoring of Lloyd's international Letter of Credit when, in the absence of injunctive relief, Leslie would only suffer monetary loss. Leslie has failed to persuade this Court that Lloyd's financial position is so dire at present that it would not be able to satisfy any judgment for monetary damages in Leslie's favor if Leslie prevails on the merits in this action. The speculative testimony offered by Leslie as proof that Lloyd's liabilities might preclude collection of any future judgment is not sufficient to satisfy Leslie's burden that no other adequate remedy at law exists in lieu of the requested injunction. "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (*quoting Virginia Petroleum Jobbers Assoc. v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). Proof more substantial than Leslie's speculation is required before this Court may award injunctive relief.

7. Because Leslie has not demonstrated that he will suffer irreparable injury if the Letter of Credit is honored by TCB and because Leslie has not established that any fraud on the part of Lloyd's so vitiates his entire transaction with Lloyd's that he was denied any value from his participation in the transaction, it is not necessary to address the remaining elements required before a preliminary injunction issues. Based on the foregoing, this Court concludes that Leslie's Motion for Preliminary Injunction should be DENIED. It is therefore

ORDERED, ADJUDGED and DECREED that the Motion for Preliminary Injunction (Docket Entry #3) filed by Plaintiff Charles Robert Leslie is DENIED.

APPENDIX D

933 F.Supp. 1315
(Cite as: 933 F.Supp. 1315)

Stuart G. HAYNSWORTH, et al., Plaintiffs,
v.
LLOYD'S OF LONDON, et al., Defendants.

Civil Action No. H-96-210.

United States District Court,
S.D. Texas.

July 15, 1996.

Jacks C. Nickens, Houston, Texas, for Plaintiffs.

Anthony Cole Duenner, Houston, Texas, for Defendants.

OPINION ON THE FORUM

LYNN N. HUGHES, District Judge.

1. Introduction.

Seventy-seven Americans became members of Lloyd's of London to participate in its insurance business. They have sued Lloyd's itself. These members seek to rescind their obligations at Lloyd's arising from policies underwritten by syndicates they had joined. Because they agreed that English law would apply to disputes arising out of their relation to Lloyd's and because they agreed to litigate those disputes in London, this case will be dismissed.

2. Lloyd's.

Lloyd's is an exchange--a place where people meet to do business. The business at Lloyd's is underwriting risks through pools of members. Often the risks at Lloyd's cannot be underwritten in conventional markets. The pools are known as syndicates. The syndicates compete for the insurance business among one another. Lloyd's does not share in the profits or losses from the underwriting of risks by the syndicates. Lloyd's itself insures no risk; its duties are regulatory. Lloyd's is managed by a board composed of prominent members who are elected by the members. The board obtains the funds necessary to conduct its business through several institutional arrangements that require member contributions, like the central fund. See generally ELIZABETH LUESSENHOP & MARTIN MAYER, RISKY BUSINESS (1995); ADAM RAPHAEL, ULTIMATE RISK: THE INSIDE STORY OF THE LLOYD'S CATASTROPHE (1994); Lloyd's of London Membership Guide, A Guide to Corporate Membership (Sept. 1993); Internal Report to the Chairman of Lloyd's, Report of an Inquiry into Syndicate Participations and the LMX Spiral (June 1992).

From its inception as a coffee house in 1680, Lloyd's has evolved into a world insurance market. It has operated in a variety of institutional forms over the last 300 years. Since 1871, it has been incorporated by act of Parliament. In the reorganization act of 1982, Parliament relieved Lloyd's itself of much of its potential liability for many aspects of its operation. See infra The Lloyd's Act, 1982, § 14(3) (Eng.).

3. Members.

The people who belong to Lloyd's fall into two principal groups. Members whose daily tasks require them to be in the trading room are known as working members. Members who do not actively participate in the operations are known as external members. Sometimes they are referred to as "names." Until recently, only natural persons could become members, and no member could limit his liability for his commitments.

In 1990, Lloyd's was comprised of 34,146 total members; 28,770 of those members were actively underwriting. Of those actively underwriting, 18.2% (5,239 members) were working members and 81.8% (23,531 members) were external members. Of the external members, 9.6% (2,259 members) were Americans. Lloyd's of London, Statistics Relating to Lloyd's (1994). Since 1990, the membership has declined precipitously to 19,537 in 1993, reflecting the enterprise's losses in profitability. Even more telling, perhaps, is the drastic reduction in the number of syndicates: from 401 in 1990 to 228 in 1993. RAPHAEL, *supra* at 311-12.

A. Working Members.

Working members function either as brokers who bring the customers' requests for coverage or as underwriters who set the premiums and accept the risk. The syndicates compete within Lloyd's for underwriting business, each managed by a Managing Agent whose duty to his investors to manage the syndicate with reasonable care. External members, however, deal only with their Members' Agent who acts in the sole interest of that cluster of external members.

These agents earn fees for handling the external members' investments. Because the nature of insurance is the spreading of risks, working and external members join syndicates to pool their risk. A syndicate ordinarily issues a portfolio of underwriting ***1319** commitments. Some syndicates specialize in types of risk by casualty, location, or activity. The working member who manages a syndicate earns fees from the investors in that syndicate.

B. External Members.

An external member or "name" is one who has applied for membership, deposited funds to secure his commitments, and hired a working member as an agent to conduct his business. External members passively furnish capital to other members who are the working underwriters. Brokers have and need no external members. The names decide how much to invest and select in which syndicates to partici-

pate. In making these decisions, however, the names rely to a great extent on the advice of their Members' Agents.

4. Market Losses.

The words "each for his own part and not for any other" are printed on every Lloyd's insurance policy. A name's liability in a syndicate is several, not joint; no name is ever responsible for the losses of those fellow names who comprise the syndicate. A name is responsible only for his share of a syndicate's losses; however, his liability is unlimited for that share. This is the hallmark of the Lloyd's tradition.

To illustrate: (a) if a working member who is a broker brings a proposal for a tanker to be insured for its value of $10 million against marine casualties, (b) if ten syndicates each accept 10% of the risk, (c) if each syndicate has four equal participants, (d) if the ship is a total loss, and (e) if one member of one syndicate goes broke, then every member of each syndicate pays $250,000, even those who have the broke partner. If one whole syndicate goes broke, the remaining syndicates are obliged only for their specific percentage of the risk they subscribed. The policyholder would then recover only 90% of his loss.

Against the claim for $250,000, the member will have received his share of the premium of about $25,000 less fees and other expenses. The member loses money on that policy, but if the underwriting is done well, his share of other premiums will more than offset the claim on the lost ship.

Members as members are not responsible for the obligations of each other, and the normal practice is that each share stands on its own; of course, formal reinsurance of one syndicate's risks by another is a form of mutual liability.

If the underwriting member accepts risks that he underestimates, resulting in the collection of a premium that is too small, the syndicate will pay more in loss claims than it collected in premiums, losing money. A pattern of misevaluated risks results in a pattern of losses.

5. American Experience.

After the market as a whole lost money in 1965 and with the rise of corporate insurers, Lloyd's examined its operation. The now-infamous Crowder report suggested several internal reforms to cure complaints of external members who were then British. The report was squelched, and the only recommendation that Lloyd's adopted was to expand its insuring capacity by attracting additional risk capital through new members.

Lloyd's expanded from 2,079 members in 1946, to 7,710 members in 1975. By 1985, it had 26,050 members. Part of this expansion was fueled by the addition of foreigners, including approximately 2,500 Americans. Profits were traditionally generous in the 1970s, but by the mid-1980s, the persistence of several kinds of liability caused current-year losses and the impossibility of reinsurance to close. Between 1990 and 1994, the Lloyd's market lost around <<PoundsSterling>>8 billion. Although the British had endured several episodes of losses historically, this was the first time American members were faced with continuous demands for cash to infuse into syndicates. RAPHAEL, *supra* at 3; Lloyd's of London, Statistics Relating to Lloyd's (1994).

6. Wrongs.

The American members have identified several ways they were cheated.

A. Churning.

The plaintiffs complain that some managing agents repeatedly reinsured the portfolio of risks held by one syndicate through a new policy with another syndicate. The continual reinsurance, say the plaintiffs, enriched the managing agents through commissions at the expense of the passive members' payment of premiums and commissions. This claim sounds like a description of churning by a stockbroker; in those cases, the broker advises the customer to sell investments

and to reinvest the proceeds for the principal purpose of generating commissions on the sales for the broker's benefit rather than achieving the customer's investment objectives.

Assuming that is the claim and assuming that was the practice, the wrong is committed by the managing agent who, of course, owes a fiduciary duty to the member. Lloyd's itself does not do the acts that constitute the churning. Its fees may well be based on the gross premium earnings, but its indirect benefit from illegal activity does not make it a participant.

B. Allocating.

The plaintiffs complain that some managing agents constructed syndicates of American passive members solely for the purpose of receiving risks from another syndicate. Done objectively, that would simply be reinsurance. The plaintiffs argue, however, that the agents reinsured risks that the agents knew to be long-term and extraordinary. The agents then selectively transferred these known losers from the syndicates they had underwritten to ones that Americans had underwritten. As long as the sucker syndicates are sufficiently solvent to pay the claims, this scheme would work.

An agent who selectively assigns gains and losses after they have occurred or after the likelihood of occurrence has materially increased breaches his duty to his principals. Steering members into syndicates with existing losses or steering reinsurance of existing losses of one's own account to the account of one's principal is wrong. This wrongful allocation, however, can only be done by the agent who manages the member's investment, not Lloyd's.

C. Fraud.

Apart from the individual misdeeds of the agents who were responsible for particular syndicates, the plaintiffs claim to have been injured by a global conspiracy. In essence, this overarching scheme was to attract new money to the market at Lloyd's so that it could be

manipulated into covering the losses that were anticipated from existing commitments. The expansion of membership was designed to produce members on whom the issuers of high liability policies could dump their exposure at unreasonably low premiums. Lloyd's was actively procuring the victims, they say, so it was an accessory before the crime.

D. Misuse of Common Funds.

The plaintiffs complain that Lloyd's used common funds to equalize losses among the names contrary to its representations of several but not joint liability.

The Central Fund is administered by Lloyd's through the Council of Lloyd's. Each name is required to make annual contributions to the fund. The plaintiffs argue that money a name puts into the Central Fund is to be specifically held for the contributing name. Lloyd's could use the name's money only in the event that an individual member's personal assets were insufficient to meet his underwriting commitments.

The plaintiffs argue that in practice, Lloyd's draws money out of the Central Fund indiscriminately, resulting in some names paying for the losses of others. Lloyd's, for example, has agreed to pay the massive losses of several syndicates with the Central Fund. The plaintiffs claim this makes them liable for unknown and unquantifiable asbestos and pollution liabilities of syndicates in whose premiums they did not participate.

The plaintiffs further claim Lloyd's has taken the deposits out of the American Trust Fund and applied them to liabilities of other names. The plaintiffs claim they understood that their deposits into this trust fund were to belong exclusively to the depositing name ***1321** and that records of the deposits would be individually maintained. The plaintiffs say the trustee of the account, however, maintains the trust account as a commingled fund and does not maintain records of how much of the fund "belongs" to each individual name. As with the Central Fund, the plaintiffs argue Lloyd's has withdrawn money from

this trust fund to pay losses without regard to the identity of the contributing name.

7. The General Undertaking.

The plaintiffs mention all of the documents that Lloyd's had them sign, suggesting that the choice of forum and choice of law provisions were hidden from them in a blizzard of paper. The bulk of the paperwork dealt with the member's financial obligations. Beyond the agreement between Lloyd's and the member, the managing agents had their contracts and each syndicate had its separate documentation.

The forum selection and choice of law clauses, however, appear in the critical instrument that forms the relation between a member and the society, as it is called, at Lloyd's. It is a mere one and a half page document called the General Undertaking. The penultimate paragraph of page one chooses the law of England. The ultimate paragraph of page one chooses the courts of England. Lloyd's General Undertaking ¶¶ 2.1., 2.2 (1984). This clause was uniformly adopted by Lloyd's in 1986. Versions of the undertaking before 1982 had similar clauses, but they varied in wording and scope. Lloyd's argues that based on these two clauses in the general undertaking, this case should be dismissed.

8. Preclusion.

[1] Fifty-three of the seventy-seven people who have sued Lloyd's in this case have sued it before; several of the plaintiffs have sued it twice. Both of those cases, one in California and one in New York, resulted in judgments that the choices of law and forum in the membership agreement were to be enforced. The California case is now on appeal. *Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir.1993), aff'g, 796 F.Supp. 103 (S.D.N.Y.1992); *Richards v. Lloyd's of London*, 1995 WL 465687 (S.D.Cal. May 1, 1995).

Lloyd's argues that, although those judgments did not reach the cases' substantive claims, the members may not contest again the

effect of the choice of law and forum, because that issue was presented fully to the earlier courts. The plaintiffs say that in those cases they did not actually reach the particular claim of invalidity they have in this case. They also say that the judge did not expressly address the validity arguments.

When a judge has issues before her of enforcement and invalidity, her judgment of enforcement necessarily decides the invalidity claim. Fifty-three of the plaintiffs have had an opportunity to oppose the application of the forum selection clause; they may not have actually employed all the grounds that could have been used, but they exhausted their opportunity to question the propriety of enforcing the contract. *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 314 (5th Cir.1987), rev'd on other grounds, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988); *Villar v. Crowley Maritime Corp.*, 780 F.Supp. 1467, 1482 (S.D.Tex.1992).

[2] Lloyd's insists that all of the plaintiffs could be said to have had the opportunity to contest the clause since two-thirds of them actually did. Despite the similarity of the claims and the parallel situations of the plaintiffs, each of the remaining twenty-four plaintiffs may litigate the application of the clause.

9. Choice of Law & Forum Selection.

[3][4][5] Forum selection clauses are presumptively valid. *International Software Systems, Inc. v. Amplicon, Inc.*, 77 F.3d 112, 113-15 (5th Cir.1996). The presumption of validity may be overcome only by a strong showing that the clause is unreasonable under the circumstances. *The Bremen v. Zapata Off- Shore Co.*, 407 U.S. 1, 10, 92 S.Ct. 1907, 1913, 32 L.Ed.2d 513 (1972). A forum selection clause is unreasonable only if: (1) its incorporation into the contract was the result of fraud; (2) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; (3) the enforcement of the ***1322** clauses would contravene a strong public policy of the forum in which the suit is brought, declared by statute or judicial decision; or (4) the selected forum is so difficult and inconvenient that the complaining party will

in effect be deprived of his day in court. *Bonny v. Society of Lloyd's*, 3 F.3d 156, 159-60 (7th Cir.1993); Richards, 1995 WL 465687 at 5; Roby, 996 F.2d at 1363.

A. Fraud.

[6] No plaintiff says that he was tricked into signing the forum selection clause. The assertion is only that the whole contract was procured through deceit. Plaintiffs argue that Lloyd's required the names to sign the forum selection and choice of law clauses to further its continuous fraudulent scheme to insulate itself from actions its fraud in solicitation of capital from the United States.

[7] The plaintiffs must show the court that the forum selection and choice of law clauses themselves were a product of fraud, or they must show that the underlying transaction was a complete sham from which no value was derived by the investor's money. *GATX Leasing Corp. v. DBM Drilling Corp.*, 657 S.W.2d 178, 183 (Tex.App.--San Antonio 1983, no writ); *Leslie v. Lloyd's of London*, 1995 WL 661090 (S.D.Tex. Aug. 20, 1995), aff'd, 85 F.3d 625 (5th Cir.1996). The plaintiffs have done neither. In addition, Lloyd's is not exempt for acts done in bad faith if the plaintiffs choose to sue Lloyd's in England.

B. Plaintiff's Opportunity to Recover.

[8] The plaintiffs complain that they have no reasonable opportunity to recover against Lloyd's in England. The principal inhibition to their success in an English lawsuit would be the Lloyd's Act of 1982, where Parliament included a limit of liability for Lloyd's. The act says:

> [T]he Society shall not be liable for damages whether for negligence or other tort, breach of duty or otherwise, in respect of any exercise of or omission to exercise any power, duty or function conferred or imposed by Lloyd's Acts 1871 to 1982 or any byelaw or regulation--

> (d) in so far as relates to the exercise of, or omission to exercise, disciplinary functions, powers and duties; or
>
> (e) in so far as relates to the exercise of, or omission to exercise, any powers, functions or duties under byelaws ...; unless the act or omission complained of--
>
> (i) was done or omitted to be done in bad faith; or
>
> (ii) was that of an employee of the Society and occurred in the course of the employee carrying out ... duties which do not involve the exercise of any discretion.

The Lloyd's Act, 1982, § 14(3) (Eng.); *see also Bonny*, 3 F.3d at 159-60 (discussing the application of section 14(3) of the 1982 Lloyd's Act to the adequacy of a plaintiff's remedy in a discussion of inconvenient forum).

The plaintiffs contend that the Lloyd's Act in effect bars them from pursuing their particular causes of action. The Lloyd's Act, however, does not grant immunity in the event of bad faith, and it is not a bar to suit but rather a defense that Lloyd's must affirmatively plead. If the 1982 act completely eliminated the plaintiffs' right to sue in England, which it does not, the critical fact remains that the plaintiffs chose England as a source of law four years after the act was passed. This case arises from moderately long-term business relations voluntarily begun; unlike the plaintiff in a personal injury case who has no part in selecting his tortfeasor, these plaintiffs chose Lloyd's as well as English law, knowing its defects.

[9] A plaintiff may not circumvent a forum selection clause merely by stating claims under laws not recognized by the forum selected in the agreement. The agreement to submit to the jurisdiction of the English courts must be enforced even if that agreement includes the forfeiture of some claims that could have been brought in a different forum. *Hugel v. Corporation of Lloyd's*, 999 F.2d 206, 210 (7th Cir.1993); *Roby*, 996 F.2d at 1360. Notably, even if the forum selec-

tion clause were invalid, because the general undertaking designates English law in its ***1323** choice of law clause, the parties would still be governed by English law (including the limited liability under the Lloyd's Act of 1982), whether they brought the suit in federal district court in Texas or in the Queens Bench in England.

To the extent that the 1982 act is retroactive, it is no worse than America's sweeping reorganization of rights and liabilities in its 1989 Financial Institutions Reform, Recovery, and Enforcement Act. Act of August 9, 1989, P.L. 101-73, 103 Stat. 183 (1989) (repealed 1991). Occasional partial legislation does not destroy the general integrity of the American legal order--nor the English one.

C. Texas Law and Public Policy.

[10] The Texas consumer protection statute has a provision that invalidates most attempts to waive its protection. Tex.Bus. & Com.Code § 17.42 ("Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void...."). The plaintiffs say that a contract term that chooses the law of England or the courts of England prevents them from having the benefits of Texas consumer protection acts and is void as a waiver.

When a party chooses to go to England to become an underwriter in England, he probably chooses English laws and courts; this choice is not a waiver but a consequence of independent, substantial choices otherwise made.

[11] Choices of law and forum in contracts have the incidental effect of preventing one party from getting to use the laws of all the excluded jurisdictions. Of course, conversely, the parties get the benefits of the selected law. Choices of law through a contract, like arbitration clauses, bind the parties. Whatever policy may be embodied in a consumer protection act, public policy strongly supports private law. Party autonomy allows parties to a contract to specify which laws will govern the contract. Contractually selecting a forum for future litigation is not an impermissible waiver of rights and does not violate pub-

lic policy, especially when the contracting parties are knowledgeable. *Hoffman v. Burroughs Corp.*, 571 F.Supp. 545, 550 (N.D.Tex.1982); *Wydel Assoc. v. Thermasol, Ltd.*, 452 F.Supp. 739, 742 (W.D.Tex.1978); *Accelerated Christian Education, Inc. v. Oracle Corp.*, 925 S.W.2d 66 (Tex.App.--Dallas 1996); see generally Christian B. Miller, Note, M/V Sky Reefer: Clear Sailing for Foreign Arbitration Clauses under COGSA, 18 HOUS.J.INT'L L. 935 (1996).

D. Inconvenient Forum.

[12][13] Even if the forum selection clause were void, Lloyd's asserts that the proper forum for this case is England. To decide whether a case has been brought in a forum whose inconvenience vitiates its authority, the court must first determine whether an alternative forum is available for the entire case and all parties can come within its jurisdiction. Second, the court must decide whether that alternative forum is adequate in that the parties will not be deprived of all remedies, even though they may not enjoy the same benefits as in an American court. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254-55, 102 S.Ct. 252, 265-66, 70 L.Ed.2d 419 (1981).

[14] If there is an alternative, adequate forum, the court must consider whether the parties' private interests suggest that forum. If the private interests do not suggest the alternative forum, the court must consider whether the public interests suggest it. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947); *Baris v. Sulpicio Lines, Inc.*, 932 F.2d 1540, 1549 (5th Cir.1991).

(1) Available Alternative Forum.

An alternative forum is available for the plaintiffs in England. Because the parties agreed in their membership contract to settle their disputes in the English courts, the plaintiffs have jurisdiction there. The forum selection clause in the general undertaking vests the plaintiffs with jurisdiction in England. Lloyd's General Undertaking, Section 2.2. Lloyd's cannot, and does not, suggest that the plaintiffs do not have jurisdiction in England. Lloyd's argument against United

States' jurisdiction is that the parties must stick to their bargain; that bargain expressly ***1324** limits the plaintiffs to the right to sue in England. In fact, many of these plaintiffs are presently suing Lloyd's in England as well as in the United States.

(2) Adequate Alternative Forum.

[15][16][17] The court must next decide whether the alternative forum is adequate in that the parties will not be deprived of all remedies, even though they may not enjoy the same benefits as in an American court. The plaintiffs argue that the English forum is not adequate because it deprives them of specific claims like the American federal securities laws or Texas consumer acts. They argue that the remedy afforded by the British forum is so clearly unsatisfactory as to be no remedy at all. The possibility of an unfavorable change in the law is merely a factor to be considered, but ordinarily this factor should not be given conclusive or even substantial weight in the forum inquiry. *Piper*, 454 U.S. at 254-55, 102 S.Ct. at 265-66. Even though they would have to rely on a different standard on negligence and it was likely that their potential damages award would be smaller, there is no danger that they will be deprived of all remedies or treated unfairly. Cases where the plaintiff would be completely denied a remedy in the foreign jurisdiction should not be dismissed. *See Industrial Development Corp. v. Mitsui & Co.*, 671 F.2d 876 (5th Cir.1982), vacated and remanded on other grounds, 460 U.S. 1007, 103 S.Ct. 1244, 75 L.Ed.2d 475 (1983) (involving allegations of U.S. antitrust issues, the court said that "to determine Indonesia to be the proper forum ... would, in effect, deprive plaintiffs of all remedy," assuming that Indonesia would not enforce the foreign antitrust laws). Universally, however, a mere reduction in recovery is not sufficient.

The English courts do not deprive the plaintiffs of all remedies. Even though Lloyd's can raise defenses to the plaintiffs' claims that may not be available here, Lloyd's is not immune from acts it took in bad faith, like fraud, intentional misrepresentation, and conversion. *See Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1145 (5th Cir.1989) (finding that Bermuda was a more convenient forum

than Louisiana for litigating a suit by joint liquidators appointed to conclude affairs of insolvent insurer in Bermuda, even though Bermuda would not recognize liquidators' claim under Racketeer Influenced and Corrupt Organizations Act. Even without the RICO claim, the court found that Bermuda would permit litigation of fraud, negligent misrepresentation, breach of fiduciary duty, and piercing corporate veil parts of liquidators' complaint, sufficiently to qualify it as an adequate alternative forum). The plaintiffs' strict view of remedies would invalidate all forum selection because remedies, by the very nature of differing jurisdictions, will inevitably vary.

(3) Private Interests.

[18] Because there is an adequate, available forum, the court must determine whether the private interests suggest that justice lies in another forum. The court must consider the parties' access to sources of proof, compulsory process, and witnesses' cheap attendance, along with other practicalities in the alternative forum that would keep the preparation and trial straightforward, expeditious, and inexpensive. *Gulf Oil*, 330 U.S. at 508, 67 S.Ct. at 843; *Baris*, 932 F.2d at 1549.

The defendant is an English entity, and all other potential defendants, working members, members' agents, and managing agents are also in England. The plaintiffs went to England, interviewed Lloyd's representatives there, and hired their managing agents there. The General Undertaking, the fundamental risk-allocation agreement, was signed in England. The insurance policies were issued in England. The overwhelming majority of incidents and the witnesses to these transactions are in England, including the access to sources of proof. These plaintiffs did business for years in England; the location bears a direct relation to the whole business.

The only inconvenience to the plaintiffs is the distance of the forum from the United States. This is not, however, a compelling reason to deny forum non conveniens dismissal. In one case, two passengers from Washington State on a cruise line brought a negligence action against the cruise operator in that state. The forum selection clause

on the cruise tickets required suit to be brought ***1325** in Florida. The court allowed dismissal from the Washington court based on forum non conveniens, despite the plaintiffs' pleas that a move to Florida would heighten their inconvenience considerably and raise the costs of the litigation. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 588- 90, 111 S.Ct. 1522, 1524-26, 113 L.Ed.2d 622 (1991); *see also Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 290 (5th Cir.1989) (upholding a district court's forum non conveniens dismissal where plaintiffs would have to travel to Saudi Arabia to pursue their claim). The defendant's interests must be weighed equally. To hold the case in England would reduce litigation costs, travel costs, and simplify both parties' access to witnesses and sources of proof.

(4) Public Interests.

[19] If the private interests do not suggest the alternative form, the court must consider whether the public interests suggest it. The private interests emphatically indicate that the forum should be England, and considering the public interest factors only reinforces that choice. Factors the court should evaluate are administrative difficulties including court congestion, the legitimate preference in having regional controversies resolved there, and the alternative court's expertise with the law that will be applied. Furthermore, the court should try to avoid unnecessary conflicts of law and applications of foreign law. *Gulf Oil*, 330 U.S. at 508, 67 S.Ct. at 843; *Baris*, 932 F.2d at 1549.

The litigation of Lloyd's-related cases has been going on for some time in the English courts. Many U.S. courts have already dismissed claims very similar to this one, involving Lloyd's as a defendant, based on forum non conveniens. *See, e.g., Bonny*, 3 F.3d at 156, 159-60; *Roby*, 996 F.2d at 1363; *Richards*, 1995 WL 465687 at 5. The English courts have dealt with these claims, will be applying their own law, and have a local interest in deciding the matter locally. That some the names who lost money were Americans is incidental; this controversy involves regional issues, decided best in the English courts. The actions of the attorneys general and the SEC do not represent public

interests relevant to an inconvenient forum analysis. The recent attention they have given Lloyd's can be described as politically motivated machinations, at best. Whatever the current and future regulatory public interest in Lloyd's may be, that interest does not attach to a private suit arising out of an historical business relation. Retention of jurisdiction would burden the community, further little or no public interest in the dispute, and apply predominately foreign law. These are grounds enough for dismissing the case on forum non conveniens. *See In re Air Crash Disaster Near New Orleans,* 821 F.2d 1147, 1165-66 (5th Cir.1987).

10. Equity.

Somewhere a crippled American will not be compensated for his injuries because an American name refused to pay the claims against the policies he issued. If, after this unseeming squabble, an American member does not have to pay his share of the losses he underwrote, the American will not beggar his English partners, rather he will beggar American insureds who will not have their claims paid, despite the American member's keeping the premiums. The plaintiffs have no claim to equity against to the Lloyd's agents and brokers with whom they did business for years. The plaintiffs are indignant that a consequence of issuing insurance policies is paying claims.

11. Regulator's Response.

The plaintiffs are inordinately proud that several states' attorneys general and the Securities and Exchange Commission have intervened to interfere with Lloyd's collection efforts in America. All those agencies have been around since the inception of American memberships at Lloyd's, yet only recently have they stirred. Twenty-five years of silence from the SEC is more than glacial government; it is consent. This spasm of activity does not represent a public policy to be factored into equity or convenience of the forum.

12. Ann Thompson.

Of the twenty-four plaintiffs who are not precluded, only one apparently did not sign an undertaking after 1986. The effective ***1326** undertaking by Ann Thompson, apparently done in 1979, does not contain the choices of law and forum clauses like the later form. In her version, she consents to appear in any court designated by Lloyd's to respond to claims against her. She also, however, agrees to arbitrate her disputes in London, and that, from her perspective, may be rather worse. Incidentally, the old form is four pages to the 1986 form's one and a half pages.

[20][21][22][23] Valid arbitration agreements contained in contracts, like forum selection and choice of law clauses, are enforceable and irrevocable in spite of attacks made on the contract as a whole. *See Pepe Int'l Development v. Pub Brewing Co.*, 915 S.W.2d 925, 930 (Tex.App.--Houston [1st Dist.] 1996, no writ). An arbitration agreement may be vacated if the agreement to arbitrate was itself fraudulently induced. Tex.Civ.Prac. & Rem.Code Ann. § 171.014(a)(5); *Hearthshire Braeswood v. Bill Kelly Co.*, 849 S.W.2d 380 (Tex.App.--Houston [14th Dist.] 1993, writ denied); *Gulf Interstate Eng'g v. Pecos Pipeline*, 680 S.W.2d 879 (Tex.App.--Houston [1st Dist.] 1984, writ dism'd). The fraudulent inducement must go the agreement to arbitrate itself and not to the underlying contract. It is not sufficient that fraud induced some part of the contract that is submitted to arbitration. Whether there is a valid agreement to arbitrate is separate from whether all or part of the underlying contract was breached. The former is a question for the trial court, while the latter is for the arbitrator. Tex.Civ.Prac. & Rem.Code Ann. § 171.014(a)(5); *Shearson Lehman Bros., Inc. v. Kilgore*, 871 S.W.2d 925 (Tex.App.--Corpus Christi 1994, orig. proceeding).

[24][25] Arbitration is favored by Texas. *Manes v. Dallas Baptist College*, 638 S.W.2d 143, 145 (Tex.App.--Dallas 1982, writ ref'd n.r.e.); *Carpenter v. North River Ins. Co.*, 436 S.W.2d 549, 553 (Tex.Civ.App.-- Houston [14th Dist.] 1968, writ ref'd n.r.e.). Under the Texas law, an agreement to arbitrate is valid unless grounds exist

for revocation. Tex.Rev.Civ.Stat.Ann. art. 224 (1992); Hearthshire, 849 S.W.2d at 386.

13. Conclusion.

Because this court finds the forum selection clause in Lloyd's general undertaking agreement to be valid and enforceable, choosing English law and English courts, and because this forum is inconvenient, the case is dismissed.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 96-20769

STUART G. HAYNSWORTH, et al.,
Plaintiffs-Appellants,

VERSUS

THE CORPORATION, a/k/a Lloyd's of London,
a/k/a Lloyd's, a/k/a the Council of Lloyd's,
a/k/a the Society of Lloyd's,
a/k/a the Committee of Lloyd's,
Defendant-Appellee.

****

NO. 96-20805

CHARLES ROBERT LESLIE,
Plaintiff-Appellee,

VERSUS

LLOYD'S OF LONDON, a/k/a the Cororation of Lloyd's,
a/k/a Lloyd's, a/k/a the Society of Lloyd's,
a/k/a the Committee of Lloyd's,
Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

(Opinion 121 F.3d 956 (5th Cir. Aug. 29, 1997))

Before SMITH, BARKSDALE and BENEVIDES, Circuit Judges.
PER CURIAM:

The Petition for Rehearing is DENIED, and no member of this panel or judge in regular active service having requested that the court be polled on rehearing en banc (see Fed. R. App. P. 35 and 5th Cir. R. 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
United States District Judge

APPENDIX F

Vernon's Ann.Texas Civ.St. Art. 581-4 —

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CIVIL STATUTES
TITLE 19--BLUE SKY LAW--SECURITIES

Art. 581-4. Definitions

The following terms shall, unless the context otherwise indicates, have the following respective meanings:

A. The term "security" or "securities" shall include any limited partner interest in a limited partnership, share, stock, treasury stock, stock certificate under a voting trust agreement, collateral trust certificate, equipment trust certificate, preorganization certificate or receipt, subscription or reorganization certificate, note, bond, debenture, mortgage certificate or other evidence of indebtedness, any form of commercial paper, certificate in or under a profit sharing or participation agreement, certificate or any instrument representing any interest in or under an oil, gas or mining lease, fee or title, or any certificate or instrument representing or secured by an interest in any or all of the capital, property, assets, profits or earnings of any company, investment contract, or any other instrument commonly known as a security, whether similar to those herein referred to or not. Provided, however, that this definition shall not apply to any insurance policy, endowment policy, annuity contract, optional annuity contract, or any contract or agreement in relation to and in consequence of any such policy or contract, issued by an insurance company subject to the supervision or control of the Texas Department of Insurance when the form of such policy or contract has been duly filed with the Department as now or hereafter required by law.

B. The terms "person" and "company" shall include a corporation, person, joint stock company, partnership, limited partnership, association, company, firm, syndicate, trust, incorporated or unincorporated,

heretofore or hereafter formed under the laws of this or any other state, country, sovereignty or political subdivision thereof, and shall include a government, or a political subdivision or agency thereof. As used herein, the term "trust" shall be deemed to include a common law trust, but shall not include a trust created or appointed under or by virtue of a last will and testament or by a court of law or equity. Under the criminal penal provisions of Section 29 of this Act, the word "person" shall mean a natural person.

C. The term "dealer" shall include every person or company other than a salesman, who engages in this state, either for all or part of his or its time, directly or through an agent, in selling, offering for sale or delivery or soliciting subscriptions to or orders for, or undertaking to dispose of, or to invite offers for any security or securities and every person or company who engages in rendering services as an investment adviser, and every person or company who deals in any other manner in any security or securities within this state. Any issuer other than a registered dealer of a security or securities, who, directly or through any person or company, other than a registered dealer, offers for sale, sells or makes sales of its own security or securities shall be deemed a dealer and shall be required to comply with the provisions hereof; provided, however, this section or provision shall not apply to such issuer when such security or securities are offered for sale or sold either to a registered dealer or only by or through a registered dealer acting as fiscal agent for the issuer; and provided further, this section or provision shall not apply to such issuer if the transaction is within the exemptions contained in the provisions of Section 5 of this Act. >[1]

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1 Article 581-5.

D. The term "salesman" or "agent" shall include every person or company employed or appointed or authorized by a dealer to sell, offer for sale or delivery, or solicit subscriptions to or orders for, or deal in any other manner, in securities within this state, whether by direct act or through subagents; provided, that the officers of a corporation or partners of a partnership shall not be deemed salesmen or agents solely because of their status as officers or partners, where such corporation or partnership is registered as a dealer hereunder.

E. The terms "sale" or "offer for sale" or "sell" shall include every disposition, or attempt to dispose of a security for value. The term "sale" means and includes contracts and agreements whereby securities are sold, traded or exchanged for money, property or other things of value, or any transfer or agreement to transfer, in trust or otherwise. Any security given or delivered with or as a bonus on account of any purchase of securities or other thing of value, shall be conclusively presumed to constitute a part of the subject of such purchase and to have been sold for value. The term "sell" means any act by which a sale is made, and the term "sale" or "offer for sale" shall include a subscription, an option for sale, a solicitation of sale, a solicitation of an offer to buy, an attempt to sell, or an offer to sell, directly or by an agent or salesman, by a circular, letter, or advertisement or otherwise, including the deposit in a United States Post Office or mail box or in any manner in the United States mails within this State of a letter, circular or other advertising matter. Nothing herein shall limit or diminish the full meaning of the terms "sale," "sell" or "offer for sale" as used by or accepted in courts of law or equity. The sale of a security under conditions which entitle the purchaser or subsequent holder to exchange the same for, or to purchase some other security, shall not be deemed a sale or offer for sale of such other security; but no exchange for or sale of such other security shall ever be made unless and until the sale thereof shall have been first authorized in Texas under this Act, if not exempt hereunder, or by other provisions of law.

F. The terms "fraud" or "fraudulent practice" shall include any misrepresentations, in any manner, of a relevant fact; any promise or representation or predication as to the future not made honestly and in

good faith, or an intentional failure to disclose a material fact; the gaining, directly or indirectly, through the sale of any security, of an underwriting or promotion fee or profit, selling or managing commission or profit, so gross or exorbitant as to be unconscionable; any scheme, device or other artifice to obtain such profit, fee or commission; provided, that nothing herein shall limit or diminish the full meaning of the terms "fraud," "fraudulent," and "fraudulent practice" as applied or accepted in courts of law or equity.

G. "Issuer" shall mean and include every company or person who proposes to issue, has issued, or shall hereafter issue any security.
H. "Broker" shall mean dealer as herein defined.

I. "Mortgage" shall be deemed to include a deed of trust to secure a debt.

J. If the sense requires it, words in the present tense include the future tense, in the masculine gender include the feminine and neuter gender, in the singular number include the plural number, and in the plural number include the singular number; "and" may be read "or" and "or" may be read "and".

K. "No par value" or "non-par" as applied to shares of stock or other securities shall mean that such shares of stock or other securities are without a given or specified par value. Whenever any classification or computation in this Act mentioned is based upon "par value" as applied to shares of stock or other securities of no par value, the amount for which such securities are sold or offered for sale to the public shall be used as a basis of such classification or computation.

L. The term "include" when used in a definition contained in this Act shall not be deemed to exclude other things or persons otherwise within the meaning of the term defined.

M. "Registered dealer" shall mean a dealer as hereinabove defined who has been duly registered by the Commissioner as in Section 15 of this Act provided.

APPENDIX G

Vernon's Ann.Texas Civ.St. Art. 581-33

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
CIVIL STATUTES
TITLE 19--BLUE SKY LAW--SECURITIES

Art. 581-33. Civil Liabilities

A. Liability of Sellers.

(1) Registration and Related Violations. A person who offers or sells a security in violation of Section 7, 9 (or a requirement of the Commissioner thereunder), 12, 23B, or an order under 23A of this Act is liable to the person buying the security from him, who may sue either at law or in equity for rescission or for damages if the buyer no longer owns the security.

(2) Untruth or Omission. A person who offers or sells a security (whether or not the security or transaction is exempt under Section 5 or 6 of this Act) by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, is liable to the
person buying the security from him, who may sue either at law or in equity for rescission, or for damages if the buyer no longer owns the security. However, a person is not liable if he sustains the burden of proof that either (a) the buyer knew of the untruth or omission or (b) he (the offeror or seller) did not know, and in the exercise of reasonable care could not have known, of the untruth or omission. The issuer of the security (other than a government issuer identified in Section 5M) is not entitled to the defense in clause (b) with respect to an untruth or omission (i) in a prospectus required in connection with a registration statement under Section 7A, 7B, or 7C, or (ii) in a writing prepared and delivered by the issuer in the sale of a security.

B. Liability of Buyers. A person who offers to buy or buys a security (whether or not the security or transaction is exempt under Section 5 or 6 of this Act) by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, is liable to the person selling the security to him, who may sue either at law or in equity for rescission or for damages if the buyer no longer owns the security. However, a person is not liable if he sustains the burden of proof that either (a) the seller knew of the untruth or omission, or (b) he (the offeror or buyer) did not know, and in the exercise of reasonable care could not have known, of the untruth or omission.

C. Liability of Nonselling Issuers Which Register.

(1) This Section 33C applies only to an issuer which registers under Section 7A, 7B, or 7C of this Act, or under Section 6 of the U.S. Securities Act of 1933, >[1] its outstanding securities for offer and sale by or for the owner of the securities.

(2) If the prospectus required in connection with the registration contains, as of its effective date, an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the issuer is liable to a person buying the registered security, who may sue either at law or in equity for rescission or for damages if the buyer no longer owns the securities. However, an issuer is not liable if it sustains the burden of proof that the buyer knew of the untruth or omission.

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1. 15 U.S.C.A. § 77f.

D. Rescission and Damages. For this Section 33:

(1) On rescission, a buyer shall recover (a) the consideration he paid for the security plus interest thereon at the legal rate from the date of payment by him, less (b) the amount of any income he received on the security, upon tender of the security (or a security of the same class and series).

(2) On rescission, a seller shall recover the security (or a security of the same class and series) upon tender of (a) the consideration he received for the security plus interest thereon at the legal rate from the date of receipt by him, less (b) the amount of any income the buyer received on the security.

(3) In damages, a buyer shall recover (a) the consideration he paid for the security plus interest thereon at the legal rate from the date of payment by him, less (b) the value of the security at the time he disposed of it plus the amount of any income he received on the security.

(4) In damages, a seller shall recover (a) the value of the security at the time of sale plus the amount of any income the buyer received on the security, less (b) the consideration paid the seller for the security plus interest thereon at the legal rate from the date of payment to the seller.

(5) For a buyer suing under Section 33C, the consideration he paid shall be deemed the lesser of (a) the price he paid and (b) the price at which the security was offered to the public.

(6) On rescission or as a part of damages, a buyer or a seller shall also recover costs.

(7) On rescission or as a part of damages, a buyer or a seller may also recover reasonable attorney's fees if the court finds that the recovery would be equitable in the circumstances.

E. Time of Tender. Any tender specified in Section 33D may be made at any time before entry of judgment.

F. Liability of Control Persons and Aiders.

(1) A person who directly or indirectly controls a seller, buyer, or issuer of a security is liable under Section 33A, 33B, or 33C jointly and severally with the seller, buyer, or issuer, and to the same extent as if he were the seller, buyer, or issuer, unless the controlling person sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

(2) A person who directly or indirectly with intent to deceive or defraud or with reckless disregard for the truth or the law materially aids a seller, buyer, or issuer of a security is liable under Section 33A, 33B, or 33C jointly and severally with the seller, buyer, or issuer, and to the same extent as if he were the seller, buyer, or issuer.

(3) There is contribution as in cases of contract among the several persons so liable.

G. Survivability of Actions. Every cause of action under this Act survives the death of any person who might have been a plaintiff or defendant.

H. Statute of Limitations.

(1) No person may sue under Section 33A(1) or 33F so far as it relates to Section 33A(1):

(a) more than three years after the sale; or

(b) if he received a rescission offer (meeting the requirements of Section 33I) before suit unless he

(I) rejected the offer in writing within 30 days of its receipt and
(ii) expressly reserved in the rejection his right to sue; or

(c) more than one year after he so rejected a rescission offer meeting the requirements of Section 33I.

(2) No person may sue under Section 33A(2), 33C, or 33F so far as it relates to 33A(2) or 33C:

(a) more than three years after discovery of the untruth or omission, or after discovery should have been made by the exercise of reasonable diligence; or

(b) more than five years after the sale; or

(c) if he received a rescission offer (meeting the requirements of Section 33I) before suit, unless he

(I) rejected the offer in writing within 30 days of its receipt, and (ii) expressly reserved in the rejection his right to sue; or

(d) more than one year after he so rejected a rescission offer meeting the requirements of Section 33I.

(3) No person may sue under Section 33B or 33F so far as it relates to Section 33B:

(a) more than three years after discovery of the untruth or omission, or after
discovery should have been made by the exercise of reasonable diligence; or

(b) more than five years after the purchase; or

© if he received a rescission offer (meeting the requirements of Section 33J) before suit unless he (i) rejected the offer in writing within 30 days of its receipt, and (ii) expressly reserved in the rejection his right to sue; or

(d) more than one year after he so rejected a rescission offer meeting the requirements of Section 33J.

I. Requirements of a Rescission Offer to Buyers. A rescission offer under Section 33H(1) or (2) shall meet the following requirements:

(1) The offer shall include financial and other information material to the offeree's decision whether to accept the offer, and shall not contain an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

(2) The offeror shall deposit funds in escrow in a state or national bank doing business in Texas (or in another bank approved by the commissioner) or receive an unqualified commitment from such a bank to furnish funds sufficient to pay the amount offered.

(3) The amount of the offer to a buyer who still owns the security shall be the amount (excluding costs and attorney's fees) he would recover on rescission under Section 33D(1).

(4) The amount of the offer to a buyer who no longer owns the security shall be the amount (excluding costs and attorney's fees) he would recover in damages under Section 33D(3).

(5) The offer shall state:

(a) the amount of the offer, as determined pursuant to Paragraph (3) or (4) above, which shall be given (i) so far as practicable in terms of a specified number of dollars and a specified rate of interest for a period starting at a specified date, and (ii) so far as necessary, in terms of specified elements (such as the value of the security when it was disposed of by the offeree) known to the offeree but not to the offeror, which are subject to the furnishing of reasonable evidence by the offeree.

(b) the name and address of the bank where the amount of the offer will be paid.

(c) that the offeree will receive the amount of the offer within a specified number of days (not more than 30) after receipt by the bank, in form reasonably acceptable to the offeror, and in compliance with the instructions in the offer, of:

(i) the security, if the offeree still owns it, or evidence of the fact and date of disposition if he no longer owns it; and

(ii) evidence, if necessary, of elements referred to in Paragraph (a)(ii) above.

(d) conspicuously that the offeree may not sue on his purchase under Section 33 unless:

(i) he accepts the offer but does not receive the amount of the offer, in which case he may sue within the time allowed by Section 33H(1)(a) or 33H(2)(a) or (b), as applicable; or

(ii) he rejects the offer in writing within 30 days of its receipt and expressly reserves in the rejection his right to sue, in which case he may sue within one year after he so rejects.

(e) in reasonable detail, the nature of the violation of this Act that occurred or may have occurred.

(f) any other information the offeror wants to include.

J. Requirements of a Rescission Offer to Sellers. A rescission offer under Section 33H(3) shall meet the following requirements:

(1) The offer shall include financial and other information material to the offeree's decision whether to accept the offer, and shall not contain an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

(2) The offeror shall deposit the securities in escrow in a state or national bank doing business in Texas (or in another bank approved by the commissioner).

(3) The terms of the offer shall be the same (excluding costs and attorney's fees) as the seller would recover on rescission under Section 33D(2).

4) The offer shall state:

(a) the terms of the offer, as determined pursuant to Paragraph (3) above, which shall be given (i) so far as practicable in terms of a specified number and kind of securities and a specified rate of interest for a period starting at a specified date, and (ii) so far as necessary, in terms of specified elements known to the offeree but not the offeror, which are subject to the furnishing of reasonable evidence by the offeree.

(b) the name and address of the bank where the terms of the offer will be carried out.

(c) that the offeree will receive the securities within a specified number of days (not more than 30) after receipt by the bank, in form reasonably acceptable to the offeror, and in compliance with the instructions in the offer, of:

(i) the amount required by the terms of the offer; and
(ii) evidence, if necessary, of elements referred to in Paragraph (a)(ii) above.

(d) conspicuously that the offeree may not sue on his sale under Section 33 unless:

(i) he accepts the offer but does not receive the securities, in which case he may sue within the time allowed by Section 33H(3)(a) or (b), as applicable; or

(ii) he rejects the offer in writing within 30 days of its receipt and expressly reserves in the rejection his right to sue, in which case he may sue within one year after he so rejects.

(e) in reasonable detail, the nature of the violation of this Act that occurred or may have occurred.

(f) any other information the offeror wants to include.

K. Unenforceability of Illegal Contracts. No person who has made or engaged in the performance of any contract in violation of any provision of this Act or any rule or order or requirement hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract.

L. Waivers Void. A condition, stipulation, or provision binding a buyer or seller of a security to waive compliance with a provision of this Act or a rule or order or requirement hereunder is void.

M. Saving of Existing Remedies. The rights and remedies provided by this Act are in addition to any other rights (including exemplary or punitive damages) or remedies that may exist at law or in equity.

N. Limitation of Liability in Small Business Issuances. (1) For purposes of this Section 33N, unless the context otherwise requires, "small business issuer" means an issuer of securities that, at the time of an offer to which this Section 33N applies:

(a) has annual gross revenues in an amount that does not exceed $25 million; and

(b) does not have a class of equity securities registered, or required to be registered, with the Securities and Exchange Commission under Section 12 of the Securities Exchange Act of 1934, as amended (> 15 U.S.C. Section 78l).

(2) This Section 33N applies only to:

(a) an offer of securities made by a small business issuer or by the seller of securities of a small business issuer that is in an aggregate amount that does not exceed $5 million; and

(b) a person who has been engaged to provide services relating to an offer of securities described by Section 33N(2)(a), including an attorney, an accountant, a consultant, or the firm of the attorney, accountant, or consultant.

(3) The maximum amount that may be recovered against a person to which this Section 33N applies in any action or series of actions under Section 33 relating to an offer of securities to which this Section 33N applies is an amount equal to three times the fee paid by the issuer or other seller to the person for the services related to the offer of securities, unless the trier of fact finds the person engaged in intentional wrongdoing in providing the services.

(4) A small business issuer making an offer of securities shall provide to the prospective buyer a written disclosure of the limitation of liability created by this Section 33N and shall receive a signed acknowledgement that the disclosure was provided.

APPENDIX H

V.T.C.A., Bus. & C. S 17.42

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
BUSINESS AND COMMERCE CODE
TITLE 2. COMPETITION AND TRADE PRACTICES
CHAPTER 17. DECEPTIVE TRADE PRACTICES
SUBCHAPTER E. DECEPTIVE TRADE PRACTICES AND CONSUMER PROTECTION

17.42. Waivers: Public Policy

(a) Any waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void; provided, however, that a waiver is valid and enforceable if:

(1) the waiver is in writing and is signed by the consumer;

(2) the consumer is not in a significantly disparate bargaining position; and

(3) the consumer is represented by legal counsel in seeking or acquiring the goods or services.

(b) A waiver under Subsection (a) is not effective if the consumer's legal counsel was directly or indirectly identified, suggested, or selected by a defendant or an agent of the defendant.

(c) A waiver under this section must be:

(1) conspicuous and in bold-face type of at least 10 points in size;

(2) identified by the heading "Waiver of Consumer Rights," or words of similar meaning; and

(3) in substantially the following form:

> "I waive my rights under the Deceptive Trade Practices-Consumer Protection Act, > Section 17.41 et seq., Business & Commerce Code, a law that gives consumers special rights and protections. After consultation with an attorney of my own selection, I voluntarily consent to this waiver."

(d) The waiver required by Subsection (c) may be modified to waive only specified rights under this subchapter.

(e) The fact that a consumer has signed a waiver under this section is not a defense to an action brought by the attorney general under Section 17.47.

APPENDIX I

V.T.C.A., Bus. & C. S 17.45

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
BUSINESS AND COMMERCE CODE
TITLE 2. COMPETITION AND TRADE PRACTICES
CHAPTER 17. DECEPTIVE TRADE PRACTICES
SUBCHAPTER E. DECEPTIVE TRADE PRACTICES
AND CONSUMER PROTECTION

17.45. Definitions

As used in this subchapter:

(1) "Goods" means tangible chattels or real property purchased or leased for use.

(2) "Services" means work, labor, or service purchased or leased for use, including services furnished in connection with the sale or repair of goods.

(3) "Person" means an individual, partnership, corporation, association, or other group, however organized.

(4) "Consumer" means an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services, except that the term does not include a business consumer that has assets of $25 million or more, or that is owned or controlled by a corporation or entity with assets of $25 million or more.

(5) "Unconscionable action or course of action" means an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.

(6) "Trade" and "commerce" mean the advertising, offering for sale, sale, lease, or distribution of any good or service, of any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value, wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this state.

(7) "Documentary material" includes the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situated.

(8) "Consumer protection division" means the antitrust and consumer protection division of the attorney general's office.

(9) "Knowingly" means actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim or, in an action brought under Subdivision (2) of Subsection (a) of Section 17.50, actual awareness of the act, practice, condition, defect, or failure constituting the breach of warranty, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness.

(10) "Business consumer" means an individual, partnership, or corporation who seeks or acquires by purchase or lease, any goods or services for commercial or business use. The term does not include this state or a subdivision or agency of this state.

(11) "Economic damages" means compensatory damages for pecuniary loss, including costs of repair and replacement. The term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.

(12) "Residence" means a building:

(A) that is a single-family house, duplex, triplex, or quadruplex or a unit in a multiunit residential structure in which title to the individual units is transferred to the owners under a condominium or cooperative system; and

(B) that is occupied or to be occupied as the consumer's residence.

(13) "Intentionally" means actual awareness of the falsity, deception, or unfairness of the act or practice, or the condition, defect, or failure constituting a breach of warranty giving rise to the consumer's claim, coupled with the specific intent that the consumer act in detrimental reliance on the falsity or deception or in detrimental ignorance of the unfairness. Intention may be inferred from objective manifestations that indicate that the person acted intentionally or from facts showing that a defendant acted with flagrant disregard of prudent and fair business practices to the extent that the defendant should be treated as having acted intentionally.

APPENDIX J

V.T.C.A., Bus. & C. S 17.46

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
BUSINESS AND COMMERCE CODE
TITLE 2. COMPETITION AND TRADE PRACTICES
CHAPTER 17. DECEPTIVE TRADE PRACTICES
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S> 17.46. Deceptive Trade Practices Unlawful

(a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division under Sections 17.47, 17.58, 17.60, and 17.61 of this code.

(b) Except as provided in Subsection (d) of this section, the term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts:

(1) passing off goods or services as those of another;

(2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;

(4) using deceptive representations or designations of geographic origin in connection with goods or services;

(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which

they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not;

(6) representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand;

(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(8) disparaging the goods, services, or business of another by false or misleading representation of facts;

(9) advertising goods or services with intent not to sell them as advertised;

(10) advertising goods or services with intent not to supply a reasonable expectable public demand, unless the advertisements disclosed a limitation of quantity;

(11) making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions;

(12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;

(13) knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service;

(14) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction;

(15) basing a charge for the repair of any item in whole or in part on a guaranty or warranty instead of on the value of the actual repairs made or work to be performed on the item without stating sepa-

rately the charges for the work and the charge for the warranty or guaranty, if any;

(16) disconnecting, turning back, or resetting the odometer of any motor vehicle so as to reduce the number of miles indicated on the odometer gauge;

(17) advertising of any sale by fraudulently representing that a person is going out of business;

(18) using or employing a chain referral sales plan in connection with the sale or offer to sell of goods, merchandise, or anything of value, which uses the sales technique, plan, arrangement, or agreement in which the buyer or prospective buyer is offered the opportunity to purchase merchandise or goods and in connection with the purchase receives the seller's promise or representation that the buyer shall have the right to receive compensation or consideration in any form for furnishing to the seller the names of other prospective buyers if receipt of the compensation or consideration is contingent upon the occurrence of an event subsequent to the time the buyer purchases the merchandise or goods;

(19) representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve, provided, however, that nothing in this subchapter shall be construed to expand the implied warranty of merchantability as defined in Sections 2.314 through 2.318 and > Sections 2A.212 through > 2A.216 of the Business & Commerce Code to involve obligations in excess of those which are appropriate to the goods;

(20) promoting a pyramid promotional scheme, as defined by Section 17.461;

(21) representing that work or services have been performed on, or parts replaced in, goods when the work or services were not performed or the parts replaced;

(22) filing suit founded upon a written contractual obligation of and signed by the defendant to pay money arising out of or based on a consumer transaction for goods, services, loans, or extensions of credit intended primarily for personal, family, household, or agricultural use in any county other than in the county in which the defendant resides at the time of the commencement of the action or in the county in which the defendant in fact signed the contract; provided, however, that a violation of this subsection shall not occur where it is shown by the person filing such suit he neither knew or had reason to know that the county in which such suit was filed was neither the county in which the defendant resides at the commencement of the suit nor the county in which the defendant in fact signed the contract;

(23) the failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed;

(24) using the term "corporation," "incorporated," or an abbreviation of either of those terms in the name of a business entity that is not incorporated under the laws of this state or another jurisdiction; or

(25) taking advantage of a disaster declared by the governor under Chapter 418, Government Code, by:

(A) selling or leasing fuel, food, medicine, or another necessity at an exorbitant or excessive price; or

(B) demanding an exorbitant or excessive price in connection with the sale or lease of fuel, food, medicine, or another necessity.

(c)(1) It is the intent of the legislature that in construing Subsection (a) of this section in suits brought under Section 17.47 of this subchapter the courts to the extent possible will be guided by Subsection (b) of this section and

the interpretations given by the Federal Trade Commission and federal courts to Section 5(a)(1) of the Federal Trade Commission Act [> 15 U.S.C.A. S 45(a)(1)].

(2) In construing this subchapter the court shall not be prohibited from considering relevant and pertinent decisions of courts in other jurisdictions.

(d) For the purposes of the relief authorized in Subdivision (1) of Subsection (a) of Section 17.50 of this subchapter, the term "false, misleading, or deceptive acts or practices" is limited to the acts enumerated in specific subdivisions of Subsection (b) of this section.

APPENDIX K

V.T.C.A., Bus. & C. S 17.50

VERNON'S TEXAS STATUTES AND CODES ANNOTATED
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S> 17.50. Relief for Consumers

(a) A consumer may maintain an action where any of the following constitute a producing cause of economic damages or damages for mental anguish:

(1) the use or employment by any person of a false, misleading, or deceptive act or practice that is:

(A) specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter; and

(B) relied on by a consumer to the consumer's detriment;

(2) breach of an express or implied warranty;

(3) any unconscionable action or course of action by any person; or

(4) the use or employment by any person of an act or practice in violation of > Article 21.21, Insurance Code.

(b) In a suit filed under this section, each consumer who prevails may obtain:

(1) the amount of economic damages found by the trier of fact. If the trier of fact finds that the conduct of the defendant was committed knowingly, the consumer may also recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of economic damages; or if the trier of fact finds the conduct was committed intentionally, the consumer may recover damages for mental anguish, as found by the trier of fact, and the trier of fact may award not more than three times the amount of damages for mental anguish and economic damages;

(2) an order enjoining such acts or failure to act;

(3) orders necessary to restore to any party to the suit any money or property, real or personal, which may have been acquired in violation of this subchapter; and

(4) any other relief which the court deems proper, including the appointment of a receiver or the revocation of a license or certificate authorizing a person to engage in business in this state if the judgment has not been satisfied within three months of the date of the final judgment. The court may not revoke or suspend a license to do business in this state or appoint a receiver to take over the affairs of a person who has failed to satisfy a judgment if the person is a licensee of or regulated by a state agency which has statutory authority to revoke or suspend a license or to appoint a receiver or trustee. Costs and fees of such receivership or other relief shall be assessed against the defendant.

(c) On a finding by the court that an action under this section was groundless in fact or law or brought in bad faith, or brought for the purpose of harassment, the court shall award to the defendant reasonable and necessary attorneys' fees and court costs.

(d) Each consumer who prevails shall be awarded court costs and reasonable and necessary attorneys' fees.

(e) In computing additional damages under Subsection (b), attorneys' fees, costs, and prejudgment interest may not be considered.

(f) A court may not award prejudgment interest applicable to:

(1) damages for future loss under this subchapter; or

(2) additional damages under Subsection (b).

(g) Chapter 41, Civil Practice and Remedies Code, does not apply to a cause of action brought under this subchapter.

(h) Notwithstanding any other provision of this subchapter, if a claimant is granted the right to bring a cause of action under this subchapter by another law, the claimant is not limited to recovery of economic damages only, but may recover any actual damages incurred by the claimant, without regard to whether the conduct of the defendant was committed intentionally. For the purpose of the recovery of damages for a cause of action described by this subsection only, a reference in this subchapter to economic damages means actual damages. In applying Subsection (b)(1) to an award of damages under this subsection, the trier of fact is authorized to award a total of not more than three times actual damages, in accordance with that subsection.

APPENDIX L

15 U.S.C.A. § 78b

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 2B--SECURITIES EXCHANGES

Current through P.L. 105-41, approved 8-13-97

§ 78b. Necessity for regulation

For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, to remove impediments to and perfect the mechanisms of a national market system for securities and a national system for the clearance and settlement of securities transactions and the safeguarding of securities and funds related thereto, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions:

(1) Such transactions (a) are carried on in large volume by the public generally and in large part originate outside the States in which the exchanges and over-the-counter markets are located and/or are effected by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of the current of interstate commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of credit, directly affect the financing of trade, industry, and transportation in interstate commerce, and di-

rectly affect and influence the volume of interstate commerce; and affect the national credit.

(2) The prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries and constitute a basis for determining and establishing the prices at which securities are bought and sold, the amount of certain taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and the value of collateral for bank loans.

(3) Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities which (a) cause alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce, (b) hinder the proper appraisal of the value of securities and thus prevent a fair calculation of taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and (c) prevent the fair valuation of collateral for bank loans and/or obstruct the effective operation of the national banking system and Federal Reserve System.

(4) National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit.

APPENDIX M

15 U.S.C.A. § 78c

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 2B--SECURITIES EXCHANGES

Current through P.L. 105-41, approved 8-13-97

§ 78c. Definitions and application

(a) Definitions

When used in this chapter, unless the context otherwise requires--

(1) The term "exchange" means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

(2) The term "facility" when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.

(3)(A) The term "member" when used with respect to a national securities exchange means (i) any natural person permitted to effect transactions on the floor of the exchange without the services of another person acting as broker, (ii) any registered broker or dealer with

which such a natural person is associated, (iii) any registered broker or dealer permitted to designate as a representative such a natural person, and (iv) any other registered broker or dealer which agrees to be regulated by such exchange and with respect to which the exchange undertakes to enforce compliance with the provisions of this chapter, the rules and regulations thereunder, and its own rules. For purposes of sections 78f(b)(1), 78f(b)(4), 78f(b)(6), 78f(b)(7), 78f(d), 78q(d), 78s(d), 78s(e), 78s(g), 78s(h), and 78u of this title, the term "member" when used with respect to a national securities exchange also means, to the extent of the rules of the exchange specified by the Commission, any person required by the Commission to comply with such rules pursuant to section 78f(f) of this title.

(B) The term "member" when used with respect to a registered securities association means any broker or dealer who agrees to be regulated by such association and with respect to whom the association undertakes to enforce compliance with the provisions of this chapter, the rules and regulations thereunder, and its own rules.

(4) The term "broker" means any person engaged in the business of effecting transactions in securities for the account of others, but does not include a bank.

(5) The term "dealer" means any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, or any person insofar as he buys or sells securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business.

(6) The term "bank" means (A) a banking institution organized under the laws of the United States, (B) a member bank of the Federal Reserve System, (C) any other banking institution, whether incorporated or not, doing business under the laws of any State or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to national banks under the authority of the Comptroller of the currency pursuant to section 92a of Title 12, and which is supervised

and examined by State or Federal authority having supervision over banks, and which is not operated for the purpose of evading the provisions of this chapter, and (D) a receiver, conservator, or other liquidating agent of any institution or firm included in clauses (A), (B), or (C) of this paragraph.

(7) The term "director" means any director of a corporation or any person performing similar functions with respect to any organization, whether incorporated or unincorporated.

(8) The term "issuer" means any person who issues or proposes to issue any security; except that with respect to certificates of deposit for securities, voting-trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors or of the fixed, restricted management, or unit type, the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which such securities are issued; and except that with respect to equipment-trust certificates or like securities, the term "issuer" means the person by whom the equipment or property is, or is to be, used.

(9) The term "person" means a natural person, company, government, or political subdivision, agency, or instrumentality of a government.

(10) The term "security" means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in gen-

eral, any instrument commonly known as a "security"; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

(11) The term "equity security" means any stock or similar security; or any security convertible, with or without consideration, into such a security, or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right; or any other security which the Commission shall deem to be of similar nature and consider necessary or appropriate, by such rules and regulations as it may prescribe in the public interest or for the protection of investors, to treat as an equity security.

(12)(A) The term "exempted security" or "exempted securities" includes--

(i) government securities, as defined in paragraph (42) of this subsection;

(ii) municipal securities, as defined in paragraph (29) of this subsection;

(iii) any interest or participation in any common trust fund or similar fund maintained by a bank exclusively for the collective investment and reinvestment of assets contributed thereto by such bank in its capacity as trustee, executor, administrator, or guardian;

(iv) any interest or participation in a single trust fund, or a collective trust fund maintained by a bank, or any security arising out of a contract issued by an insurance company, which interest, participation, or security is issued in connection with a qualified plan as defined in subparagraph (C) of this paragraph;

(v) any security issued by or any interest or participation in any pooled income fund, collective trust fund, collective investment fund, or similar fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940 [15 U.S.C.A. § 80a-3(c)(10)(B)];

vi) solely for purposes of sections 78l, 78m, 78n, and, 78p of this title, any security issued by or any interest or participation in any church plan, company, or account that is excluded from the definition of an investment company under section 80a-3(c)(14) of this title; and

(vii) such other securities (which may include, among others, unregistered securities, the market in which is predominantly intrastate) as the Commission may, by such rules and regulations as it deems consistent with the public interest and the protection of investors, either unconditionally or upon specified terms and conditions or for stated periods, exempt from the operation of any one or more provisions of this chapter which by their terms do not apply to an "exempted security" or to "exempted securities".

(B)(i) Notwithstanding subparagraph (A)(i) of this paragraph, government securities shall not be deemed to be "exempted securities" for the purposes of section 78q-1 of this title.

(ii) Notwithstanding subparagraph (A)(ii) of this paragraph, municipal securities shall not be deemed to be "exempted securities" for the purposes of sections 78o and 78q-1 of this title.

(C) For purposes of subparagraph (A)(iv) of this paragraph, the term "qualified plan" means (i) a stock bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of Title 26, (ii) an annuity plan which meets the requirements for the deduction of the employer's contribution under section 404(a)(2) of

Title 26, or (iii) a governmental plan as defined in section 414(d) of Title 26 which has been established by an employer for the exclusive benefit of its employees or their beneficiaries for the purpose of distributing to such employees or their beneficiaries the corpus and income of the funds accumulated under such plan, if under such plan it is impossible, prior to the satisfaction of all liabilities with respect to such employees and their beneficiaries, for any part of the corpus or income to be used for, or diverted to, purposes other than the exclusive benefit of such employees or their beneficiaries, other than any plan described in clause (i), (ii), or (iii) of this subparagraph which (I) covers employees some or all of whom are employees within the meaning of section 401(c) of Title 26, or (II) is a plan funded by an annuity contract described in section 403(b) of Title 26.

(13) The terms "buy" and "purchase" each include any contract to buy, purchase, or otherwise acquire.

(14) The terms "sale" and "sell" each include any contract to sell or otherwise dispose of.

(15) The term "Commission" means the Securities and Exchange Commission established by section 78d of this title.

(16) The term "State" means any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any other possession of the United States.

(17) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State, or between any State and any place or ship outside thereof. The term also includes intrastate use of (A) any facility of a national securities exchange or of a telephone or other interstate means of communication, or (B) any other interstate instrumentality.

(18) The term "person associated with a broker or dealer" or "associated person of a broker or dealer" means any partner, officer, di-

rector, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer, except that any person associated with a broker or dealer whose functions are solely clerical or ministerial shall not be included in the meaning of such term for purposes of section 78o(b) of this title (other than paragraph (6) thereof).

(19) The terms "investment company", "affiliated person", "insurance company", "separate account", and "company" have the same meanings as in the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.].

(20) The terms "investment adviser" and "underwriter" have the same meanings as in the Investment Advisers Act of 1940 [15 U.S.C.A. § 80b-1 et. seq.].

(21) The term "person associated with a member" or "associated person of a member" when used with respect to a member of a national securities exchange or registered securities association means any partner, officer, director, or branch manager of such member (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such member, or any employee of such member.

(22)(A) The term "securities information processor" means any person engaged in the business of (i) collecting, processing, or preparing for distribution or publication, or assisting, participating in, or coordinating the distribution or publication of, information with respect to transactions in or quotations for any security (other than an exempted security) or (ii) distributing or publishing (whether by means of a ticker tape, a communications network, a terminal display device, or otherwise) on a current and continuing basis, information with respect to such transactions or quotations. The term "securities information processor" does not include any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation, any self-regulatory organizations, any bank, broker, dealer, building

and loan, savings and loan, or homestead association, or cooperative bank, if such bank, broker, dealer, association, or cooperative bank would be deemed to be a securities information processor solely by reason of functions performed by such institutions as part of customary banking, brokerage, dealing, association, or cooperative bank activities, or any common carrier, as defined in section 153(h) of Title 47, subject to the jurisdiction of the Federal Communications Commission or a State commission, as defined in section 153(t) of Title 47, unless the Commission determines that such carrier is engaged in the business of collecting, processing, or preparing for distribution or publication, information with respect to transactions in or quotations for any security.

(B) The term "exclusive processor" means any securities information processor or self-regulatory organization which, directly or indirectly, engages on an exclusive basis on behalf of any national securities exchange or registered securities association, or any national securities exchange or registered securities association which engages on an exclusive basis on its own behalf, in collecting, processing, or preparing for distribution or publication any information with respect to (i) transactions or quotations on or effected or made by means of any facility of such exchange or (ii) quotations distributed or published by means of any electronic system operated or controlled by such association.

(23)(A) The term "clearing agency" means any person who acts as an intermediary in making payments or deliveries or both in connection with transactions in securities or who provides facilities for comparison of data respecting the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement responsibilities. Such term also means any person, such as a securities depository, who (i) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry without physical delivery of securities certificates, or (ii) otherwise per-

mits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates.

(B) The term "clearing agency" does not include (i) any Federal Reserve bank, Federal home loan bank, or Federal land bank; (ii) any national securities exchange or registered securities association solely by reason of its providing facilities for comparison of data respecting the terms of settlement of securities transactions effected on such exchange or by means of any electronic system operated or controlled by such association; (iii) any bank, broker, dealer, building and loan, savings and loan, or homestead association, or cooperative bank if such bank, broker, dealer, association, or cooperative bank would be deemed to be a clearing agency solely by reason of functions performed by such institution as part of customary banking, brokerage, dealing, association, or cooperative banking activities, or solely by reason of acting on behalf of a clearing agency or a participant therein in connection with the furnishing by the clearing agency of services to its participants or the use of services of the clearing agency by its participants, unless the Commission, by rule, otherwise provides as necessary or appropriate to assure the prompt and accurate clearance and settlement of securities transactions or to prevent evasion of this chapter; (iv) any life insurance company, its registered separate accounts, or a subsidiary of such insurance company solely by reason of functions commonly performed by such entities in connection with variable annuity contracts or variable life policies issued by such insurance company or its separate accounts; (v) any registered open-end investment company or unit investment trust solely by reason of functions commonly performed by it in connection with shares in such registered open-end investment company or unit investment trust, or (vi) any person solely by reason of its performing functions described in paragraph (25)(E) of this subsection.

(24) The term "participant" when used with respect to a clearing agency means any person who uses a clearing agency to clear or settle securities transactions or to transfer, pledge, lend, or hypothecate securities. Such term does not include a person whose only use of a

clearing agency is (A) through another person who is a participant or (B) as a pledgee of securities.

(25) The term "transfer agent" means any person who engages on behalf of an issuer of securities or on behalf of itself as an issuer of securities in (A) countersigning such securities upon issuance; (B) monitoring the issuance of such securities with a view to preventing unauthorized issuance, a function commonly performed by a person called a registrar; (C) registering the transfer of such securities; (D) exchanging or converting such securities; or (E) transferring record ownership of securities by bookkeeping entry without physical issuance of securities certificates. The term "transfer agent" does not include any insurance company or separate account which performs such functions solely with respect to variable annuity contracts or variable life policies which it issues or any registered clearing agency which performs such functions solely with respect to options contracts which it issues.

(26) The term "self-regulatory organization" means any national securities exchange, registered securities association, or registered clearing agency, or (solely for purposes of sections 78s(b), 78s(c), and 78w(b) of this title) the Municipal Securities Rulemaking Board established by section 78o-4 of this title.

(27) The term "rules of an exchange", "rules of an association", or "rules of a clearing agency" means the constitution, articles of incorporation, bylaws, and rules, or instruments corresponding to the foregoing, of an exchange, association of brokers and dealers, or clearing agency, respectively, and such of the stated policies, practices, and interpretations of such exchange, association, or clearing agency as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors to be deemed to be rules of such exchange, association, or clearing agency.

(28) The term "rules of a self-regulatory organization" means the rules of an exchange which is a national securities exchange, the rules of an association of brokers and dealers which is a registered securi-

ties association, the rules of a clearing agency which is a registered clearing agency, or the rules of the Municipal Securities Rulemaking Board.

(29) The term "municipal securities" means securities which are direct obligations of, or obligations guaranteed as to principal or interest by, a State or any political subdivision thereof, or any agency or instrumentality of a State or any political subdivision thereof, or any municipal corporate instrumentality of one or more States, or any security which is an industrial development bond (as defined in section 103(c)(2) of Title 26) the interest on which is excludable from gross income under section 103(a)(1) of Title 26 if, by reason of the application of paragraph (4) or (6) of section 103(c) of Title 26 (determined as if paragraphs (4)(A), (5), and (7) were not included in such section 103(c)), paragraph (1) of such section 103(c) does not apply to such security.

(30) The term "municipal securities dealer" means any person (including a separately identifiable department or division of a bank) engaged in the business of buying and selling municipal securities for his own account, through a broker or otherwise, but does not include--

(A) any person insofar as he buys or sells such securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business; or

(B) a bank, unless the bank is engaged in the business of buying and selling municipal securities for its own account other than in a fiduciary capacity, through a broker or otherwise: Provided, however, That if the bank is engaged in such business through a separately identifiable department or division (as defined by the Municipal Securities Rulemaking Board in accordance with section 78o-4(b)(2)(H) of this title), the department or division and not the bank itself shall be deemed to be the municipal securities dealer.

(31) The term "municipal securities broker" means a broker engaged in the business of effecting transactions in municipal securities for the account of others.

(32) The term "person associated with a municipal securities dealer" when used with respect to a municipal securities dealer which is a bank or a division or department of a bank means any person directly engaged in the management, direction, supervision, or performance of any of the municipal securities dealer's activities with respect to municipal securities, and any person directly or indirectly controlling such activities or controlled by the municipal securities dealer in connection with such activities.

(33) The term "municipal securities investment portfolio" means all municipal securities held for investment and not for sale as part of a regular business by a municipal securities dealer or by a person, directly or indirectly, controlling, controlled by, or under common control with a municipal securities dealer.

(34) The term "appropriate regulatory agency" means--

(A) When used with respect to a municipal securities dealer:

(i) the Comptroller of the Currency, in the case of a national bank or a bank operating under the Code of Law for the District of Columbia, or a subsidiary or a department or division of any such bank;

(ii) the Board of Governors of the Federal Reserve System, in the case of a State member bank of the Federal Reserve System, a subsidiary or a department or division thereof, a bank holding company, a subsidiary of a bank holding company which is a bank other than a bank specified in clause (i) or (iii) of this subparagraph, or a subsidiary or a department or division of such subsidiary;

(iii) the Federal Deposit Insurance Corporation, in the case of a bank insured by the Federal Deposit Insurance Corporation (other

than a member of the Federal Reserve System), or a subsidiary or department or division thereof; and

(iv) the Commission in the case of all other municipal securities dealers.

(B) When used with respect to a clearing agency or transfer agent:

(i) the Comptroller of the Currency, in the case of a national bank or a bank operating under the Code of Law for the District of Columbia, or a subsidiary of any such bank;

(ii) the Board of Governors of the Federal Reserve System, in the case of a State member bank of the Federal Reserve System, a subsidiary thereof, a bank holding company, or a subsidiary of a bank holding company which is a bank other than a bank specified in clause (i) or (iii) of this subparagraph;

(iii) the Federal Deposit Insurance Corporation, in the case of a bank insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System), or a subsidiary thereof; and

(iv) the Commission in the case of all other clearing agencies and transfer agents.

(C) When used with respect to a participant or applicant to become a participant in a clearing agency or a person requesting or having access to services offered by a clearing agency:

(i) the Comptroller of the Currency, in the case of a national bank or a bank operating under the Code of Law for the District of Columbia when the appropriate regulatory agency for such clearing agency is not the Commission;

(ii) the Board of Governors of the Federal Reserve System in the case of a State member bank of the Federal Reserve System, a

bank holding company, or a subsidiary of a bank holding company, or a subsidiary of a bank holding company which is a bank other than a bank specified in clause (i) or (iii) of this subparagraph when the appropriate regulatory agency for such clearing agency is not the Commission;

(iii) the Federal Deposit Insurance Corporation, in the case of a bank insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System) when the appropriate regulatory agency for such clearing agency is not the Commission; and

(iv) the Commission in all other cases.

(D) When used with respect to an institutional investment manager which is a bank the deposits of which are insured in accordance with the Federal Deposit Insurance Act [12 U.S.C.A. § 1811 et seq.]:

(i) the Comptroller of the Currency, in the case of a national bank or a bank operating under the Code of Law for the District of Columbia;

(ii) the Board of Governors of the Federal Reserve System, in the case of any other member bank of the Federal Reserve System; and

(iii) the Federal Deposit Insurance Corporation, in the case of any other insured bank.

(E) When used with respect to a national securities exchange or registered securities association, member thereof, person associated with a member thereof, applicant to become a member thereof or to become associated with a member thereof, or person requesting or having access to services offered by such exchange or association or member thereof, or the Municipal Securities Rulemaking Board, the Commission.

(F) When used with respect to a person exercising investment discretion with respect to an account;

(i) the Comptroller of the Currency, in the case of a national bank or a bank operating under the Code of Law for the District of Columbia;

(ii) the Board of Governors of the Federal Reserve System in the case of any other member bank of the Federal Reserve System;

(iii) the Federal Deposit Insurance Corporation, in the case of any other bank the deposits of which are insured in accordance with the Federal Deposit Insurance Act [12 U.S.C.A. § 1811 et seq.]; and

(iv) the Commission in the case of all other such persons.

(G) When used with respect to a government securities broker or government securities dealer, or person associated with a government securities broker or government securities dealer:

(i) the Comptroller of the Currency, in the case of a national bank, a bank in the District of Columbia examined by the Comptroller of the Currency, or a Federal branch or Federal agency of a foreign bank (as such terms are used in the International Banking Act of 1978 [12 U.S.C.A. § 3101 et seq.]);

(ii) the Board of Governors of the Federal Reserve System, in the case of a State member bank of the Federal Reserve System, a foreign bank, an uninsured State branch or State agency of a foreign bank, a commercial lending company owned or controlled by a foreign bank (as such terms are used in the International Banking Act of 1978), or a corporation organized or having an agreement with the Board of Governors of the Federal Reserve System pursuant to section 25 or section 25A of the Federal Reserve Act [12 U.S.C.A. §§ 601 et seq., 611 et seq.];

(iii) the Federal Deposit Insurance Corporation, in the case of a bank insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System or a Federal savings bank) or an insured State branch of a foreign bank (as such terms are used in the International Banking Act of 1978);

(iv) the Director of the Office of Thrift Supervision, in the case of a savings association (as defined in section 3(b) of the Federal Deposit Insurance Act [12 U.S.C.A. § 1813(b)]) the deposits of which are insured by the Federal Deposit Insurance Corporation; [FN1]

(v) the Commission, in the case of all other government securities brokers and government securities dealers.

As used in this paragraph, the terms "bank holding company" and "subsidiary of a bank holding company" have the meanings given them in section 1841 of Title 12, and the term "District of Columbia savings and loan association" means any association subject to examination and supervision by the Office of Thrift Supervision under section 1466a of Title 12.

(35) A person exercises "investment discretion" with respect to an account if, directly or indirectly, such person (A) is authorized to determine what securities or other property shall be purchased or sold by or for the account, (B) makes decisions as to what securities or other property shall be purchased or sold by or for the account even though some other person may have responsibility for such investment decisions, or (C) otherwise exercises such influence with respect to the purchase and sale of securities or other property by or for the account as the Commission, by rule, determines, in the public interest or for the protection of investors, should be subject to the operation of the provisions of this chapter and the rules and regulations thereunder.

(36) A class of persons or markets is subject to "equal regulation" if no member of the class has a competitive advantage over any other member thereof resulting from a disparity in their regulation under

this chapter which the Commission determines is unfair and not necessary or appropriate in furtherance of the purposes of this chapter.

(37) The term "records" means accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type, whether expressed in ordinary or machine language.

(38) The term "market maker" means any specialist permitted to act as a dealer, any dealer acting in the capacity of block positioner, and any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuous basis.

(39) A person is subject to a "statutory disqualification" with respect to membership or participation in, or association with a member of, a self- regulatory organization, if such person--

(A) has been and is expelled or suspended from membership or participation in, or barred or suspended from being associated with a member of, any self- regulatory organization, foreign equivalent of a self-regulatory organization, foreign or international securities exchange, contract market designated pursuant to section 5 of the Commodity Exchange Act (7 U.S.C. 7), or any substantially equivalent foreign statute or regulation, or futures association registered under section 17 of such Act (7 U.S.C. 21), or any substantially equivalent foreign statute or regulation, or has been and is denied trading privileges on any such contract market or foreign equivalent;

(B) is subject to--

(i) an order to the Commission, other appropriate regulatory agency, or foreign financial regulatory authority--

(I) denying, suspending for a period not exceeding 12 months, or revoking his registration as a broker, dealer, municipal securities dealer,

government securities broker, or government securities dealer or limiting his activities as a foreign person performing a function substantially equivalent to any of the above; or

(II) barring or suspending for a period not exceeding 12 months his being associated with a broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or foreign person performing a function substantially equivalent to any of the above;

(ii) an order of the Commodity Futures Trading Commission denying, suspending, or revoking his registration under the Commodity Exchange Act (7 U.S.C. 1 et seq.); or

(iii) an order by a foreign financial regulatory authority denying, suspending, or revoking the person's authority to engage in transactions in contracts of sale of a commodity for future delivery or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent thereof;

(C) by his conduct while associated with a broker, dealer, municipal securities dealer, government securities broker, or government securities dealer, or while associated with an entity or person required to be registered under the Commodity Exchange Act [7 U.S.C.A. § 1 et seq.], has been found to be a cause of any effective suspension, expulsion, or order of the character described in subparagraph (A) or (B) of this paragraph, and in entering such a suspension, expulsion, or order, the Commission, an appropriate regulatory agency, or any such self-regulatory organization shall have jurisdiction to find whether or not any person was a cause thereof;

(D) by his conduct while associated with any broker, dealer, municipal securities dealer, government securities broker, government securities dealer, or any other entity engaged in transactions in securities, or while associated with an entity engaged in transactions in contracts of sale of a commodity for future delivery or other instruments traded on or subject to the rules of a contract market, board of trade,

or foreign equivalent thereof, has been found to be a cause of any effective suspension, expulsion, or order by a foreign or international securities exchange or foreign financial regulatory authority empowered by a foreign government to administer or enforce its laws relating to financial transactions as described in subparagraph (A) or (B) of this paragraph;

(E) has associated with him any person who is known, or in the exercise of reasonable care should be known, to him to be a person described by subparagraph (A), (B), (C), or (D) of this paragraph; or

(F) has committed or omitted any act enumerated in subparagraph (D), (E), or (G) of paragraph (4) of section 78o(b) of this title, has been convicted of any offense specified in subparagraph (B) of such paragraph (4) or any other felony within ten years of the date of the filing of an application for membership or participation in, or to become associated with a member of, such self-regulatory organization, is enjoined from any action, conduct, or practice specified in subparagraph (C) of such paragraph (4), has willfully made or caused to be made in any application for membership or participation in, or to become associated with a member of, a self-regulatory organization, report required to be filed with a self-regulatory organization, or proceeding before a self-regulatory organization, any statement which was at the time, and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or has omitted to state in any such application, report, or proceeding any material fact which is required to be stated therein.

(40) The term "financial responsibility rules" means the rules and regulations of the Commission or the rules and regulations prescribed by any self-regulatory organization relating to financial responsibility and related practices which are designated by the Commission, by rule or regulation, to be financial responsibility rules.

(41) The term "mortgage related security" means a security that is rated in one of the two highest rating categories by at least one nationally recognized statistical rating organization, and either:

(A) represents ownership of one or more promissory notes or certificates of interest or participation in such notes (including any rights designed to assure servicing of, or the receipt or timeliness of receipt by the holders of such notes, certificates, or participations of amounts payable under, such notes, certificates, or participations), which notes:

(i) are directly secured by a first lien on a single parcel of real estate, including stock allocated to a dwelling unit in a residential cooperative housing corporation, upon which is located a dwelling or mixed residential and commercial structure, on a residential manufactured home as defined in section 5402(6) of Title 42, whether such manufactured home is considered real or personal property under the laws of the State in which it is to be located or on one or more parcels of real estate upon which is located one or more commercial structures; and

(ii) were originated by a savings and loan association, savings bank, commercial bank, credit union, insurance company, or similar institution which is supervised and examined by a Federal or State authority, or by a mortgagee approved by the Secretary of Housing and Urban Development pursuant to sections 1709 and 1715b of Title 12, or, where such notes involve a lien on the manufactured home, by any such institution or by any financial institution approved for insurance by the Secretary of Housing and Urban Development pursuant to section 1703 of Title 12; or

(B) is secured by one or more promissory notes or certificates of interest or participations in such notes (with or without recourse to the issuer thereof) and, by its terms, provides for payments of principal in relation to payments, or reasonable projections of payments, on notes meeting the requirements of subparagraphs (A)(i) and (ii) or certificates of interest or participations in promissory notes meeting such requirements.

For the purpose of this paragraph, the term "promissory note", when used in connection with a manufactured home, shall also in-

clude a loan, advance, or credit sale as evidence[2] by a retail installment sales contract or other instrument.

(42) The term "government securities" means--

(A) securities which are direct obligations of, or obligations guaranteed as to principal or interest by, the United States;

(B) securities which are issued or guaranteed by corporations in which the United States has a direct or indirect interest and which are designated by the Secretary of the Treasury for exemption as necessary or appropriate in the public interest or for the protection of investors;

(C) securities issued or guaranteed as to principal or interest by any corporation the securities of which are designated, by statute specifically naming such corporation, to constitute exempt securities within the meaning of the laws administered by the Commission; or

(D) for purposes of sections 78o-5 and 78q-1 of this title, any put, call, straddle, option, or privilege on a security described in subparagraph (A), (B), or (C) other than a put, call, straddle, option, or privilege--

(i) that is traded on one or more national securities exchanges; or

(ii) for which quotations are disseminated through an automated quotation system operated by a registered securities association.

(43) The term "government securities broker" means any person regularly engaged in the business of effecting transactions in government securities for the account of others, but does not include--

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1. So in original. Probably should be "evidenced."

(A) any corporation the securities of which are government securities under subparagraph (B) or (C) of paragraph (42) of this subsection; or

(B) any person registered with the Commodity Futures Trading Commission, any contract market designated by the Commodity Futures Trading Commission, such contract market's affiliated clearing organization, or any floor trader on such contract market, solely because such person effects transactions in government securities that the Commission, after consultation with the Commodity Futures Trading Commission, has determined by rule or order to be incidental to such person's futures-related business.

(44) The term "government securities dealer" means any person engaged in the business of buying and selling government securities for his own account, through a broker or otherwise, but does not include--

(A) any person insofar as he buys or sells such securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business;

(B) any corporation the securities of which are government securities under subparagraph (B) or (C) of paragraph (42) of this subsection;

(C) any bank, unless the bank is engaged in the business of buying and selling government securities for its own account other than in a fiduciary capacity, through a broker or otherwise; or

(D) any person registered with the Commodity Futures Trading Commission, any contract market designated by the Commodity Futures Trading Commission, such contract market's affiliated clearing organization, or any floor trader on such contract market, solely because such person effects transactions in government securities that the Commission, after consultation with the Commodity Futures Trading Commission, has determined by rule or order to be incidental to such person's futures-related business.

(45) The term "person associated with a government securities broker or government securities dealer" means any partner, officer, director, or branch manager of such government securities broker or government securities dealer (or any person occupying a similar status or performing similar functions), and any other employee of such government securities broker or government securities dealer who is engaged in the management, direction, supervision, or performance of any activities relating to government securities, and any person directly or indirectly controlling, controlled by, or under common control with such government securities broker or government securities dealer.

(46) The term "financial institution" means--

(A) a bank (as defined in paragraph (6) of this subsection);

(B) a foreign bank (as such term is used in the International Banking Act of 1978); and

(C) a savings association (as defined in section 3(b) of the Federal Deposit Insurance Act [12 U.S.C.A. § 1813(b)]) the deposits of which are insured by the Federal Deposit Insurance Corporation.

(47) The term "securities laws" means the Securities Act of 1933 (15 U.S.C. 77a et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), the Public Utility Holding Company Act of 1935 (15 U.S.C. 79a et seq.) [15 U.S.C.A. § 79 et seq.], the Trust Indenture Act of 1939 (15 U.S.C. 77aaa et seq.), the Investment Company Act of 1940 (15 U.S.C. 80a-1 et seq.), the Investment Advisers Act of 1940 (15 U.S.C. 80b et seq.) [15 U.S.C.A. § 80b-1 et seq.], and the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.).

(48) The term "registered broker or dealer" means a broker or dealer registered or required to register pursuant to section 78o or 78o-4 of this title, except that in paragraph (3) of this subsection and sections 78f and 78o-3 of this title the term means such a broker or dealer and a government securities broker or government securities dealer registered or required to register pursuant to section 78o-5(a)(1)(A) of this title.

(49) The term "person associated with a transfer agent" and "associated person of a transfer agent" mean any person (except an employee whose functions are solely clerical or ministerial) directly engaged in the management, direction, supervision, or performance of any of the transfer agent's activities with respect to transfer agent functions, and any person directly or indirectly controlling such activities or controlled by the transfer agent in connection with such activities.

(50) The term "foreign securities authority" means any foreign government, or any governmental body or regulatory organization empowered by a foreign government to administer or enforce its laws as they relate to securities matters.

(51)(A) The term "penny stock" means any equity security other than a security that is--

(i) registered or approved for registration and traded on a national securities exchange that meets such criteria as the Commission shall prescribe by rule or regulation for purposes of this paragraph;

(ii) authorized for quotation on an automated quotation system sponsored by a registered securities association, if such system (I) was established and in operation before January 1, 1990, and (II) meets such criteria as the Commission shall prescribe by rule or regulation for purposes of this paragraph;

(iii) issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C.A. § 80a-1 et seq.];

(iv) excluded, on the basis of exceeding a minimum price, net tangible assets of the issuer, or other relevant criteria, from the definition of such term by rule or regulation which the Commission shall prescribe for purposes of this paragraph; or

(v) exempted, in whole or part, conditionally or unconditionally, from the definition of such term by rule, regulation, or order prescribed by the Commission.

(B).The Commission may, by rule, regulation, or order, designate any equity security or class of equity securities described in clause (i) or (ii) of subparagraph (A) as within the meaning of the term "penny stock" if such security or class of securities is traded other than on a national securities exchange or through an automated quotation system described in clause (ii) of subparagraph (A).

(C) In exercising its authority under this paragraph to prescribe rules, regulations, and orders, the Commission shall determine that such rule, regulation, or order is consistent with the public interest and the protection of investors.

(52) The term "foreign financial regulatory authority" means any (A) foreign securities authority, (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of fiduciaries, trusts, commercial lending, insurance, trading in contracts of sale of a commodity for future delivery, or other instruments traded on or subject to the rules of a contract market, board of trade, or foreign equivalent, or other financial activities, or (C) membership organization a function of which is to regulate participation of its members in activities listed above.

(53)(A) The term "small business related security" means a security that is rated in 1 of the 4 highest rating categories by at least 1 nationally recognized statistical rating organization, and either--

(i) represents an interest in 1 or more promissory notes or leases of personal property evidencing the obligation of a small business concern and originated by an insured depository institution, insured credit union, insurance company, or similar institution which is supervised and examined by a Federal or State authority, or a finance company or leasing company; or

(ii) is secured by an interest in 1 or more promissory notes or leases of personal property (with or without recourse to the issuer or lessee) and provides for payments of principal in relation to pay-

ments, or reasonable projections of payments, on notes or leases described in clause (i).

(B) For purposes of this paragraph--

(i) an "interest in a promissory note or a lease of personal property" includes ownership rights, certificates of interest or participation in such notes or leases, and rights designed to assure servicing of such notes or leases, or the receipt or timely receipt of amounts payable under such notes or leases;

(ii) the term "small business concern" means a business that meets the criteria for a small business concern established by the Small Business Administration under section 632(a) of this title;

(iii) the term "insured depository institution" has the same meaning as in section 3 of the Federal Deposit Insurance Act [12 U.S.C.A. § 1813]; and

(iv) the term "insured credit union" has the same meaning as in section 1752 of Title 12.

(b) Power to define technical, trade, accounting, and other terms

The Commission and the Board of Governors of the Federal Reserve System, as to matters within their respective jurisdictions, shall have power by rules and regulations to define technical, trade, accounting, and other terms used in this chapter, consistently with the provisions and purposes of this chapter.

(c) Application to governmental departments or agencies

No provision of this chapter shall apply to, or be deemed to include, any executive department or independent establishment of the United States, or any lending agency which is wholly owned, directly or indirectly, by the United States, or any officer, agent, or employee of any such department, establishment, or agency, acting in the course of his

official duty as such, unless such provision makes specific reference to such department, establishment, or agency.

(d) Issuers of municipal securities

No issuer of municipal securities or officer or employee thereof acting in the course of his official duties as such shall be deemed to be a "broker", "dealer", or "municipal securities dealer" solely by reason of buying, selling, or effecting transactions in the issuer's securities.

(e) Charitable organizations

(1) Exemption

Notwithstanding any other provision of this chapter, but subject to paragraph (2) of this subsection, a charitable organization, as defined in section 3(c)(10)(D) of the Investment Company Act of 1940 [15 U.S.C.A. § 80a-3(c)(10)(D)], or any trustee, director, officer, employee, or volunteer of such a charitable organization acting within the scope of such person's employment or duties with such organization, shall not be deemed to be a "broker", "dealer", "municipal securities broker", "municipal securities dealer", "government securities broker", or "government securities dealer" for purposes of this chapter solely because such organization or person buys, holds, sells, or trades in securities for its own account in its capacity as trustee or administrator of, or otherwise on behalf of or for the account of--

(A) such a charitable organization;

(B) a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940 [15 U.S.C.A. § 80a-3(c)(10)(B)]; or

(C) a trust or other donative instrument described in section 3(c)(10)(B) of the Investment Company Act of 1940 [15 U.S.C.A. § 80a-3(c)(10)(B)], or the settlors (or potential settlors) or beneficiaries of any such trust or other instrument.

(2) Limitation on compensation

The exemption provided under paragraph (1) shall not be available to any charitable organization, or any trustee, director, officer, employee, or volunteer of such a charitable organization, unless each person who, on or after 90 days after December 8, 1995, solicits donations on behalf of such charitable organization from any donor to a fund that is excluded from the definition of an investment company under section 3(c)(10)(B) of the Investment Company Act of 1940 [15 U.S.C.A § 80a-3(c)(10)(B)], is either a volunteer or is engaged in the overall fund raising activities of a charitable organization and receives no commission or other special compensation based on the number or the value of donations collected for the fund.

(f) Consideration of promotion of efficiency, competition, and capital formation

Whenever pursuant to this chapter the Commission is engaged in rulemaking, or in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

(g) Church plans

No church plan described in section 414(e) of Title 26, no person or entity eligible to establish and maintain such a plan under Title 26, no company or account that is excluded from the definition of an investment company under section 80a-3(c)(14) of this title, and no trustee, director, officer or employee of or volunteer for such plan, company, account person, or entity, acting within the scope of that person's employment or activities with respect to such plan, shall be deemed to be a "broker", "dealer", "municipal securities broker", "municipal securities dealer", "government securities broker", "government securities dealer", "clearing agency", or "transfer agent" for purposes of this chapter--

(1) solely because such plan, company, person, or entity buys, holds, sells, trades in, or transfers securities or acts as an intermediary in making payments in connection with transactions in securities for its own account in its capacity as trustee or administrator of, or otherwise on behalf of, or for the account of, any church plan, company, or account that is excluded from the definition of an investment company under section 80a-3(c)(14) of this title; and

(2) if no such person or entity receives a commission or other transaction- related sales compensation in connection with any activities conducted in reliance on the exemption provided by this subsection.

APPENDIX N

15 U.S.C.A. § 78j

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 2B--SECURITIES EXCHANGES

Current through P.L. 105-41, approved 8-13-97

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

APPENDIX O

15 U.S.C.A. § 78cc

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 2B--SECURITIES EXCHANGES

Current through P.L. 105-41, approved 8-13-97

§ 78cc. Validity of contracts

(a) Waiver provisions

Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

(b) Contract provisions in violation of chapter

Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation: Provided, (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (3) of subsection (c) of section 78o of this title, and (B) that no contract shall be

deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) or (2) of subsection (c) of section 78o of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation. The Commission may, in a rule or regulation prescribed pursuant to such paragraph (2) of such section 78o(c) of this title, designate such rule or regulation, or portion thereof, as a rule or regulation, or portion thereof, a contract in violation of which shall not be void by reason of this subsection.

(c) Validity of loans, extensions of credit, and creation of liens; actual knowledge of violation

APPENDIX P

15 U.S.C.A. § 78l

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 2B--SECURITIES EXCHANGES

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Current through P.L. 105-41, approved 8-13-97

§ 78l. Registration requirements for securities

(a) General requirement of registration

It shall be unlawful for any member, broker, or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective as to such security for such exchange in accordance with the provisions of this chapter and the rules and regulations thereunder.

(b) Procedure for registration; information

A security may be registered on a national securities exchange by the issuer filing an application with the exchange (and filing with the Commission such duplicate originals thereof as the Commission may require), which application shall contain--

(1) Such information, in such detail, as to the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer, and any guarantor of the security as to principal or interest or both, as the Commission may by rules and regulations require, as necessary or appropriate in the public interest or for the protection of investors, in respect of the following:

(A) the organization, financial structure, and nature of the business;

(B) the terms, position, rights, and privileges of the different classes of securities outstanding;

(C) the terms on which their securities are to be, and during the preceding three years have been, offered to the public or otherwise;

(D) the directors, officers, and underwriters, and each security holder of record holding more than 10 per centum of any class of any equity security of the issuer (other than an exempted security), their remuneration and their interests in the securities of, and their material contracts with, the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer;

(E) remuneration to others than directors and officers exceeding $20,000 per annum;

(F) bonus and profit-sharing arrangements;

(G) management and service contracts;

(H) options existing or to be created in respect of their securities;

(I) material contracts, not made in the ordinary course of business, which are to be executed in whole or in part at or after the filing of the application or which were made not more than two years before such filing, and every material patent or contract for a material patent right shall be deemed a material contract;

(J) balance sheets for not more than the three preceding fiscal years, certified if required by the rules and regulations of the Commission by independent public accountants;

(K) profit and loss statements for not more than the three preced-

ing fiscal years, certified if required by the rules and regulations of the Commission by independent public accountants; and

(L) any further financial statements which the Commission may deem necessary or appropriate for the protection of investors.

(2) Such copies of articles of incorporation, bylaws, trust indentures, or corresponding documents by whatever name known, underwriting arrangements, and other similar documents of, and voting trust agreements with respect to, the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer as the Commission may require as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security.

(3) Such copies of material contracts, referred to in paragraph (1)(I) above, as the Commission may require as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security.

(c) Additional or alternative information

If in the judgment of the Commission any information required under subsection (b) of this section is inapplicable to any specified class or classes of issuers, the Commission shall require in lieu thereof the submission of such other information of comparable character as it may deem applicable to such class of issuers.

(d) Effective date of registration; withdrawal of registration

If the exchange authorities certify to the Commission that the security has been approved by the exchange for listing and registration, the registration shall become effective thirty days after the receipt of such certification by the Commission or within such shorter period of time as the Commission may determine. A security registered with a national securities exchange may be withdrawn or stricken

from listing and registration in accordance with the rules of the exchange and, upon such terms as the Commission may deem necessary to impose for the protection of investors, upon application by the issuer or the exchange to the Commission; whereupon the issuer shall be relieved from further compliance with the provisions of this section and section 78m of this title and any rules or regulations under such sections as to the securities so withdrawn or stricken. An unissued security may be registered only in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(e) Exemption from provisions of section for period ending not later than July 1, 1935

Notwithstanding the foregoing provisions of this section, the Commission may by such rules and regulations as it deems necessary or appropriate in the public interest or for the protection of investors, permit securities listed on any exchange at the time the registration of such exchange as a national securities exchange becomes effective, to be registered for a period ending not later than July 1, 1935, without complying with the provisions of this section.

(f) Unlisted trading privileges for security originally listed on another national exchange

(1)(A) Notwithstanding the preceding subsections of this section, any national securities exchange, in accordance with the requirements of this subsection and the rules hereunder, may extend unlisted trading privileges to--

(i) any security that is listed and registered on a national securities exchange, subject to subparagraph (B); and

(ii) any security that is otherwise registered pursuant to this section, or that would be required to be so registered except for the exemption from registration provided in subparagraph (B) or (G)

of subsection (g)(2) of this section, subject to subparagraph (E) of this paragraph.

(B) A national securities exchange may not extend unlisted trading privileges to a security described in subparagraph (A)(i) during such interval, if any, after the commencement of an initial public offering of such security, as is or may be required pursuant to subparagraph (C).

(C) Not later than 180 days after October 22, 1994, the Commission shall prescribe, by rule or regulation, the duration of the interval referred to in subparagraph (B), if any, as the Commission determines to be necessary or appropriate for the maintenance of fair and orderly markets, the protection of investors and the public interest, or otherwise in furtherance of the purposes of this chapter. Until the earlier of the effective date of such rule or regulation or 240 days after October 22, 1994, such interval shall begin at the opening of trading on the day on which such security commences trading on the national securities exchange with which such security is registered and end at the conclusion of the next day of trading.

(D) The Commission may prescribe, by rule or regulation such additional procedures or requirements for extending unlisted trading privileges to any security as the Commission deems necessary or appropriate for the maintenance of fair and orderly markets, the protection of investors and the public interest, or otherwise in furtherance of the purposes of this chapter.

(E) No extension of unlisted trading privileges to securities described in subparagraph (A)(ii) may occur except pursuant to a rule, regulation, or order of the Commission approving such extension or extensions. In promulgating such rule or regulation or in issuing such order, the Commission--

(i) shall find that such extension or extensions of unlisted trading privileges is consistent with the maintenance of fair and orderly

markets, the protection of investors and the public interest, and otherwise in furtherance of the purposes of this chapter;

(ii) shall take account of the public trading activity in such securities, the character of such trading, the impact of such extension on the existing markets for such securities, and the desirability of removing impediments to and the progress that has been made toward the development of a national market system; and

(iii) shall not permit a national securities exchange to extend unlisted trading privileges to such securities if any rule of such national securities exchange would unreasonably impair the ability of a dealer to solicit or effect transactions in such securities for its own account, or would unreasonably restrict competition among dealers in such securities or between such dealers acting in the capacity of market makers who are specialists and such dealers who are not specialists.

(F) An exchange may continue to extend unlisted trading privileges in accordance with this paragraph only if the exchange and the subject security continue to satisfy the requirements for eligibility under this paragraph, including any rules and regulations issued by the Commission pursuant to this paragraph, except that unlisted trading privileges may continue with regard to securities which had been admitted on such exchange prior to July 1, 1964, notwithstanding the failure to satisfy such requirements. If unlisted trading privileges in a security are discontinued pursuant to this subparagraph, the exchange shall cease trading in that security, unless the exchange and the subject security thereafter satisfy the requirements of this paragraph and the rules issued hereunder.

(G) For purposes of this paragraph--

(i) a security is the subject of an initial public offering if--

(I) the offering of the subject security is registered under the Securities Act of 1933 [15 U.S.C.A. § 77a et seq.]; and

(II) the issuer of the security, immediately prior to filing the registration statement with respect to the offering, was not subject to the reporting requirements of section 78m or 78o(d) of this title; and

(ii) an initial public offering of such security commences at the opening of trading on the day on which such security commences trading on the national securities exchange with which such security is registered.

(2)(A) At any time within 60 days of commencement of trading on an exchange of a security pursuant to unlisted trading privileges, the Commission may summarily suspend such unlisted trading privileges on the exchange. Such suspension shall not be reviewable under section 78y of this title and shall not be deemed to be a final agency action for purposes of section 704 of Title 5. Upon such suspension--

(i) the exchange shall cease trading in the security by the close of business on the date of such suspension, or at such time as the Commission may prescribe by rule or order for the maintenance of fair and orderly markets, the protection of investors and the public interest, or otherwise in furtherance of the purposes of this chapter; and

(ii) if the exchange seeks to extend unlisted trading privileges to the security, the exchange shall file an application to reinstate its ability to do so with the Commission pursuant to such procedures as the Commission may prescribe by rule or order for the maintenance of fair and orderly markets, the protection of investors and the public interest, or otherwise in furtherance of the purposes of this chapter.

(B) A suspension under subparagraph (A) shall remain in effect until the Commission, by order, grants approval of an application to reinstate, as described in subparagraph (A)(ii).

(C) A suspension under subparagraph (A) shall not affect the validity or force of an extension of unlisted trading privileges in effect prior to such suspension.

(D) The Commission shall not approve an application by a national securities exchange to reinstate its ability to extend unlisted trading privileges to a security unless the Commission finds, after notice and opportunity for hearing, that the extension of unlisted trading privileges pursuant to such application is consistent with the maintenance of fair and orderly markets, the protection of investors and the public interest, and otherwise in furtherance of the purposes of this chapter. If the application is made to reinstate unlisted trading privileges to a security described in paragraph (1)(A)(ii), the Commission--

(i) shall take account of the public trading activity in such security, the character of such trading, the impact of such extension on the existing markets for such a security, and the desirability of removing impediments to and the progress that has been made toward the development of a national market system; and

(ii) shall not grant any such application if any rule of the national securities exchange making application under this subsection would unreasonably impair the ability of a dealer to solicit or effect transactions in such security for its own account, or would unreasonably restrict competition among dealers in such security or between such dealers acting in the capacity of marketmakers who are specialists and such dealers who are not specialists.

(3) Notwithstanding paragraph (2), the Commission shall by rules and regulations suspend unlisted trading privileges in whole or in part for any or all classes of securities for a period not exceeding twelve months, if it deems such suspension necessary or appropriate in the public interest or for the protection of investors or to prevent evasion of the purposes of this chapter.

(4) On the application of the issuer of any security for which unlisted trading privileges on any exchange have been continued or ex-

tended pursuant to this subsection, or of any broker or dealer who makes or creates a market for such security, or of any other person having a bona fide interest in the question of termination or suspension of such unlisted trading privileges, or on its own motion, the Commission shall by order terminate, or suspend for a period not exceeding twelve months, such unlisted trading privileges for such security if the Commission finds, after appropriate notice and opportunity for hearing, that such termination or suspension is necessary or appropriate in the public interest or for the protection of investors.

(5) In any proceeding under this subsection in which appropriate notice and opportunity for hearing are required, notice of not less than ten days to the applicant in such proceeding, to the issuer of the security involved, to the exchange which is seeking to continue or extend or has continued or extended unlisted trading privileges for such security, and to the exchange, if any, on which such security is listed and registered, shall be deemed adequate notice, and any broker or dealer who makes or creates a market for such security, and any other person having a bona fide interest in such proceeding, shall upon application be entitled to be heard.

(6) Any security for which unlisted trading privileges are continued or extended pursuant to this subsection shall be deemed to be registered on a national securities exchange within the meaning of this chapter. The powers and duties of the Commission under this chapter shall be applicable to the rules of an exchange in respect of any such security. The Commission may, by such rules and regulations as it deems necessary or appropriate in the public interest or for the protection of investors, either unconditionally or upon specified terms and conditions, or for stated periods, exempt such securities from the operation of any provision of section 78m, 78n, or 78p of this title.

(g) Registration of securities by issuer; exemptions

(1) Every issuer which is engaged in interstate commerce, or in a business affecting interstate commerce, or whose securities are traded

by use of the mails or any means or instrumentality of interstate commerce shall--

(A) within one hundred and twenty days after the last day of its first fiscal year ended after July 1, 1964, on which the issuer has total assets exceeding $1,000,000 and a class of equity security (other than an exempted security) held of record by seven hundred and fifty or more persons; and

(B) within one hundred and twenty days after the last day of its first fiscal year ended after two years from July 1, 1964, on which the issuer has total assets exceeding $1,000,000 and a class of equity security (other than an exempted security) held of record by five hundred or more but less than seven hundred and fifty persons,

register such security by filing with the Commission a registration statement (and such copies thereof as the Commission may require) with respect to such security containing such information and documents as the Commission may specify comparable to that which is required in an application to register a security pursuant to subsection (b) of this section. Each such registration statement shall become effective sixty days after filing with the Commission or within such shorter period as the Commission may direct. Until such registration statement becomes effective it shall not be deemed filed for the purposes of section 78r of this title. Any issuer may register any class of equity security not required to be registered by filing a registration statement pursuant to the provisions of this paragraph. The Commission is authorized to extend the date upon which any issuer or class of issuers is required to register a security pursuant to the provisions of this paragraph.

(2) The provisions of this subsection shall not apply in respect of--

(A) any security listed and registered on a national securities exchange.

(B) any security issued by an investment company registered pursuant to section 80a-8 of this title.

(C) any security, other than permanent stock, guaranty stock, permanent reserve stock, or any similar certificate evidencing nonwithdrawable capital, issued by a savings and loan association, building and loan association, cooperative bank, homestead association, or similar institution, which is supervised and examined by State or Federal authority having supervision over any such institution.

(D) any security of an issuer organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any private shareholder or individual; or any security of a fund that is excluded from the definition of an investment company under section 80a-3(c)(10)(B) of this title.

(E) any security of an issuer which is a "cooperative association" as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, [12 U.S.C.A. 1141 et seq.], or a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined.

(F) any security issued by a mutual or cooperative organization which supplies a commodity or service primarily for the benefit of its members and operates not for pecuniary profit, but only if the security is part of a class issuable only to persons who purchase commodities or services from the issuer, the security is transferable only to a successor in interest or occupancy of premises serviced or to be served by the issuer, and no dividends are payable to the holder of the security.

(G) any security issued by an insurance company if all of the following conditions are met:

(i) Such insurance company is required to and does file an annual statement with the Commissioner of Insurance (or other officer or agency performing a similar function) of its domiciliary State, and

such annual statement conforms to that prescribed by the National Association of Insurance Commissioners or in the determination of such State commissioner, officer or agency substantially conforms to that so prescribed.

(ii) Such insurance company is subject to regulation by its domiciliary State of proxies, consents, or authorizations in respect of securities issued by such company and such regulation conforms to that prescribed by the National Association of Insurance Commissioners.

(iii) After July 1, 1966, the purchase and sales of securities issued by such insurance company by beneficial owners, directors, or officers of such company are subject to regulation (including reporting) by its domiciliary State substantially in the manner provided in section 78p of this title.

(H) any interest or participation in any collective trust funds maintained by a bank or in a separate account maintained by an insurance company which interest or participation is issued in connection with (i) a stock-bonus, pension, or profit-sharing plan which meets the requirements for qualification under section 401 of Title 26, or (ii) an annuity plan which meets the requirements for deduction of the employer's contribution under section 404(a)(2) of Title 26.

(3) The Commission may by rules or regulations or, on its own motion, after notice and opportunity for hearing, by order, exempt from this subsection any security of a foreign issuer, including any certificate of deposit for such a security, if the Commission finds that such exemption is in the public interest and is consistent with the protection of investors.

(4) Registration of any class of security pursuant to this subsection shall be terminated ninety days, or such shorter period as the Commission may determine, after the issuer files a certification with the Commission that the number of holders of record of such class of security is reduced to less than three hundred persons. The Commission shall

after notice and opportunity for hearing deny termination of registration if it finds that the certification is untrue. Termination of registration shall be deferred pending final determination on the question of denial.

(5) For the purposes of this subsection the term "class" shall include all securities of an issuer which are of substantially similar character and the holders of which enjoy substantially similar rights and privileges. The Commission may for the purpose of this subsection define by rules and regulations the terms "total assets" and "held of record" as it deems necessary or appropriate in the public interest or for the protection of investors in order to prevent circumvention of the provisions of this subsection.

(h) Exemption by rules and regulations from certain provisions of section

The Commission may by rules and regulations, or upon application of an interested person, by order, after notice and opportunity for hearing, exempt in whole or in part any issuer or class of issuers from the provisions of subsection (g) of this section or from section 78m, 78n, or 78o(d) of this title or may exempt from section 78p of this title any officer, director, or beneficial owner of securities of any issuer, any security of which is required to be registered pursuant to subsection (g) hereof, upon such terms and conditions and for such period as it deems necessary or appropriate, if the Commission finds, by reason of the number of public investors, amount of trading interest in the securities, the nature and extent of the activities of the issuer, income or assets of the issuer, or otherwise, that such action is not inconsistent with the public interest or the protection of investors. The Commission may, for the purposes of any of the above-mentioned sections or subsections of this chapter, classify issuers and prescribe requirements appropriate for each such class.

(i) Securities issued by banks

In respect of any securities issued by banks and savings associations the deposits of which are insured in accordance with the Federal Deposit Insurance Act [12 U.S.C.A. § 1811 et seq.], the powers, functions, and duties vested in the Commission to administer and enforce this section and sections 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p of this title, (1) with respect to national banks and banks operating under the Code of Law for the District of Columbia are vested in the Comptroller of the Currency, (2) with respect to all other member banks of the Federal Reserve System are vested in the Board of Governors of the Federal Reserve System, (3) with respect to all other insured banks are vested in the Federal Deposit Insurance Corporation, and (4) with respect to savings associations the accounts of which are insured by the Federal Deposit Insurance Corporation are vested in the Office of Thrift Supervision. The Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision shall have the power to make such rules and regulations as may be necessary for the execution of the functions vested in them as provided in this subsection. In carrying out their responsibilities under this subsection, the agencies named in the first sentence of this subsection shall issue substantially similar regulations to regulations and rules issued by the Commission under this section and sections 78m, 78n(a), 78n(c), 78n(d), 78n(f), and 78p of this title unless they find that implementation of substantially similar regulations with respect to insured banks and insured institutions are not necessary or appropriate in the public interest or for protection of investors, and publish such findings, and the detailed reasons therefor, in the Federal Register. Such regulations of the above-named agencies, or the reasons for failure to publish such substantially similar regulations to those of the Commission, shall be published in the Federal Register within 120 days of October 28, 1974, and, thereafter, within 60 days of any changes made by the Commission in its relevant regulations and rules.

(j) Denial, suspension, or revocation of registration; notice and hearing

The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, on the record after notice and opportunity for hearing, that the issuer, of such security has failed to comply with any provision of this chapter or the rules and regulations thereunder. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence.

(k) Trading suspensions; emergency authority

(1) Trading suspensions

If in its opinion the public interest and the protection of investors so require, the Commission is authorized by order--

(A) summarily to suspend trading in any security (other than an exempted security) for a period not exceeding 10 business days, and

(B) summarily to suspend all trading on any national securities exchange or otherwise, in securities other than exempted securities, for a period not exceeding 90 calendar days.

The action described in subparagraph (B) shall not take effect unless the Commission notifies the President of its decision and the President notifies the Commission that the President does not disapprove of such decision.

(2) Emergency orders

(A) The Commission, in an emergency, may by order summarily take such action to alter, supplement, suspend, or impose requirements or restrictions with respect to any matter or action subject to regula-

tion by the Commission or a self-regulatory organization under this chapter, as the Commission determines is necessary in the public interest and for the protection of investors--

(i) to maintain or restore fair and orderly securities markets (other than markets in exempted securities); or

(ii) to ensure prompt, accurate, and safe clearance and settlement of transactions in securities (other than exempted securities).

(B) An order of the Commission under this paragraph (2) shall continue in effect for the period specified by the Commission, and may be extended, except that in no event shall the Commission's action continue in effect for more than 10 business days, including extensions. In exercising its authority under this paragraph, the Commission shall not be required to comply with the provisions of section 553 of Title 5 or with the provisions of section 78s(c) of this title.

(3) Termination of emergency actions by President

The President may direct that action taken by the Commission under paragraph (1)(B) or paragraph (2) of this subsection shall not continue in effect.

(4) Compliance with orders

No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in contravention of an order of the Commission under this subsection unless such order has been stayed, modified, or set aside as provided in paragraph (5) of this subsection or has ceased to be effective upon direction of the President as provided in paragraph (3).

(5) Limitations on review of orders

An order of the Commission pursuant to this subsection shall be subject to review only as provided in section 78y(a) of this title. Review shall be based on an examination of all the information before the Commission at the time such order was issued. The reviewing court shall not enter a stay, writ of mandamus, or similar relief unless the court finds, after notice and hearing before a panel of the court, that the Commission's action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

(6) "Emergency" defined

For purposes of this subsection, the term "emergency" means a major market disturbance characterized by or constituting--

(A) sudden and excessive fluctuations of securities prices generally, or a substantial threat thereof, that threaten fair and orderly markets, or

(B) a substantial disruption of the safe or efficient operation of the national system for clearance and settlement of securities, or a substantial threat thereof.

(l) Issuance of any security in contravention of rules and regulations; application to annuity contracts and variable life policies

It shall be unlawful for an issuer, any class of whose securities is registered pursuant to this section or would be required to be so registered except for the exemption from registration provided by subsection (g)(2)(B) or (g)(2)(G) of this section, by the use of any means or instrumentality of interstate commerce, or of the mails, to issue, either originally or upon transfer, any of such securities in a form or with a format which contravenes such rules and regulations as the Commission may prescribe as necessary or appropriate for the prompt and accurate clearance and settlement of transactions in securities. The provisions of this subsection shall not apply to variable annuity contracts or variable life policies issued by an insurance company or its separate accounts.

Nothing in this chapter shall be construed (1) to affect the validity of any loan or extension of credit (or any extension or renewal thereof) made or of any lien created prior or subsequent to the enactment of this chapter, unless at the time of the making of such loan or extension of credit (or extension or renewal thereof) or the creating of such lien, the person making such loan or extension of credit (or extension or renewal thereof) or acquiring such lien shall have actual knowledge of facts by reason of which the making of such loan or extension of credit (or extension or renewal thereof) or the acquisition of such lien is a violation of the provisions of this chapter or any rule or regulation thereunder, or (2) to afford a defense to the collection of any debt or obligation or the enforcement of any lien by any person who shall have acquired such debt, obligation, or lien in good faith for value and without actual knowledge of the violation of any provision of this chapter or any rule or regulation thereunder affecting the legality of such debt, obligation, or lien.

No. 97-1283

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STUART HAYNSWORTH, *et al.*,

Petitioners,

—v.—

LLOYD'S OF LONDON, *et al.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT LLOYD'S IN OPPOSITION

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PARTIES TO THE PROCEEDING

Respondent Lloyd's, sued herein as Lloyd's of London, a/k/a The Corporation of Lloyd's, a/k/a Lloyd's, a/k/a The Society of Lloyd's, a/k/a The Committee of Lloyd's, is not a publicly held corporation, has no parent corporation, and has no subsidiaries that are not wholly owned.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Lloyd's respectfully submits this opposition to the petition for a writ of certiorari (the "Petition," cited herein as "Pet.") seeking review of a judgment of the United States Court of Appeals for the Fifth Circuit that requires Petitioners to adjudicate their claims against Lloyd's in the English courts, pursuant to English law, as they contractually committed to do.

STATEMENT OF THE CASE

The Petition presents two straightforward questions, each of which has already been definitively resolved by prior precedent of this Court. The first question is whether, as the Court of Appeals for the Fifth Circuit found, forum selection and choice of law clauses contained in international agreements between the Petitioners and Respondent Lloyd's (the "Choice Clause") are enforceable when claims under the federal or state securities laws, or other state statutes with "anti-waiver" provisions, are asserted in the U.S. courts. Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), resolved this question in the affirmative, holding that the anti-waiver provisions of the federal securities laws do not bar enforcement of a forum agreement made in the context of a truly international transaction. Likewise, the anti-waiver provisions of the Texas securities and consumer fraud statutes do not bar enforcement of international forum selection agreements. The seven United States Courts of Appeals that have considered the enforceability of the Choice Clause—the Second, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits—have, following Scherk, unanimously held that the Choice Clause is enforceable as to both federal and/or state statutory claims.[1]

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[1] Richards v. Lloyd's of London, Nos. 95-55747, 95-56467, 1998 WL 39231 (9th Cir. Feb. 3, 1998) (en banc); Allen v. Lloyd's of London, 94 F.3d 923 (4th Cir. 1996), mandamus denied, 117 S. Ct. 2497 (1997); Shell v. R.W. Sturge, Ltd., 55 F.3d 1227 (6th Cir. 1995);

Footnote continued

The second question is whether the Fifth Circuit applied the correct legal standard in finding that Petitioners had failed to demonstrate fraud going specifically to the Choice Clause itself, as opposed to fraud in the inducement of the underlying agreement.[2] This Court's decisions in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), Scherk, and Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), clearly establish that the Fifth Circuit properly rejected Petitioners' assertion that generalized allegations of fraud in the inducement of the underlying agreements between them and Lloyd's are sufficient to invalidate the Choice Clause as the product of fraud.

Factual Background

Respondent Lloyd's is an English entity incorporated by, and granted regulatory powers pursuant to, Acts of the British Parliament. See Appendix for Petitioners ("Pet. App.") 108a. Specifically, pursuant to Lloyd's Act 1982, Lloyd's, through its governing body the Council of Lloyd's, is charged with the authority to regulate an English insurance market, and the participants in that market, who reside in approximately eighty nations. Lloyd's regulatory functions must be exercised in accordance with the Lloyd's Act 1982 and the Insurance Companies Act 1982, both English statutes. Lloyd's is further

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Bonny v. Society of Lloyd's, 3 F.3d 156 (7th Cir. 1993), cert. denied, 510 U.S. 1113 (1994); Roby v. Corporation of Lloyd's, 996 F.2d 1353 (2d Cir.), cert. denied, 510 U.S. 945 (1993); Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953 (10th Cir.), cert. denied, 506 U.S. 1021 (1992).

[2] As Petitioners concede, all but three of them (Pet. 21 n.9) are collaterally estopped from relitigating this issue by their participation in Richards, in which the Ninth Circuit rejected the same allegations of fraud in the inducement of the Choice Clause. 1998 WL 39231 at *7-8.

subject to direct supervision by Her Majesty's Treasury.[3] Lloyd's is not an insurer, and does not underwrite or insure risks, accept premiums, or share in the profits or losses of those who underwrite risks in the Lloyd's market. Pet. App. 3a, 108a.

Petitioners are Texas residents who are underwriting members of Lloyd's, known as "Names." Names are individuals (and, since 1994, corporations) who each act as insurers in the Lloyd's market: they, and not Lloyd's, receive premiums from policyholders, and they, not Lloyd's, are directly liable to policyholders for the insurance risks they have underwritten. As required by English law, individual Names, such as Petitioners, are personally liable on the risks they insure to the full extent of their personal wealth. Pet. App. 3a-4a. However, under English law (Lloyd's Act 1982 § 8(1)), a Name's liability is several, not joint; a Name bears no responsibility for the underwriting obligations of other Names, and has no right to share in the underwriting profits of other Names. Pet. App. 3a-4a.

English statutes require that for an individual to underwrite insurance in the United Kingdom he must become a member of Lloyd's. Insurance Companies Act 1982 §§ 2(1)-(2). Lloyd's establishes regulatory requirements, financial and otherwise, that prospective Names must meet to qualify for underwriting membership in the Lloyd's market. Before admission to the market, Names must travel to London to meet with a representative of the Council of Lloyd's to acknowledge their awareness of the risks of underwriting, including the unlimited nature of their personal liability. Pet. App. 4a.

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[3] Lloyd's was subject to the supervision of the British Department of Trade and Industry until January 5, 1998, when these supervisory functions were transferred to the Treasury.

In order to become an underwriting member of the Lloyd's market, each Name—whether resident in the United States, England, or any of approximately eighty other countries—is required to enter into a simple two-page agreement with Lloyd's called the "General Undertaking." Pet. App. 4a. The General Undertaking of Petitioner Charles Robert Leslie is appended hereto in the Appendix for Respondents ("Resp. App.") R1. Each of the Petitioners has executed the General Undertaking. Pet. App. 4a. In so doing, Petitioners expressly agreed to comply with all English statutory requirements relating to their underwriting in the Lloyd's market and with all regulations promulgated by the Council of Lloyd's pursuant to the legislative and regulatory authority that Parliament granted to it. Resp. App. R2. Petitioners thus misstate the record when they assert that the General Undertaking consists of "nothing more than the [forum selection and choice of law] clause." Pet. 6.

Consistent with their agreement to subject themselves to English insurance statutes and Lloyd's regulatory authority, Petitioners, like all Names worldwide, agreed in the General Undertaking to adjudicate any disputes they might have relating to their membership of or underwriting in the Lloyd's market in English courts pursuant to English law. Specifically, paragraph 2.1 of the General Undertaking (Resp. App. R2) states:

> The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.

Paragraph 2.2 (id.) states:

> Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of

> or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding (together in this Clause 2 referred to as "Proceedings") arising out of or relating to such matters shall be brought in such courts and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England and irrevocably waives any objection which it may have now or hereafter to (a) any Proceedings being brought in any such court as is referred to in this Clause 2 and (b) any claim that any such Proceedings have been brought in an inconvenient forum and further irrevocably agrees that a judgment in any Proceedings brought in the English courts shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction.

Petitioners are wrong in their assertion that the Choice Clause contained in the 1986 General Undertaking was the first forum agreement between Names and Lloyd's. Pet. 6. As the Fifth Circuit correctly noted, even before the 1986 General Undertaking was required, Names had signed other forms of undertaking with Lloyd's requiring adjudication in England of disputes between Names and other Names, and between Names and their agents. Pet. App. 14a-15a. Petitioners do not point to any contradictory evidence.

Procedural History

The Leslie Case. Charles Robert Leslie commenced an action against Lloyd's on June 20, 1990. He asserted claims under section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)) and Rule 10b-5 thereunder (17 C.F.R. § 240.10b-5), as well as pendent claims under Texas law for fraud, breach of fiduciary duty, and violations of the Consumer Protection Deceptive Trade Practices Act (the "DTPA"), Tex.

Bus. & Com. Code Ann. § 17.41 et seq. (West Supp. 1997).[4]

Lloyd's moved to dismiss the case pursuant to Federal Rule of Civil Procedure 12(b)(6) on the grounds that the Choice Clause and the doctrine of forum non conveniens required Leslie to adjudicate his dispute with Lloyd's in the English courts, and for failure to state a claim upon which relief could be granted. Lloyd's also sought dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. By order dated September 4, 1991, the district court (Rainey, J.) affirmed, over Lloyd's objections, the recommendations of a Magistrate Judge that Lloyd's motion be denied in all respects. Lloyd's sought reconsideration of the district court's order.

After granting Lloyd's motion for reconsideration, the district court affirmed its original order. Pet. App. 28a-30a. The Leslie district court made clear that in deciding the dismissal motion it assumed the truth of Leslie's allegations. Pet. App. 35a nn.15-16.[5] Petitioners thus repeatedly misstate the record by referring to factual "findings" made by the Leslie court in declining to enforce the Choice Clause based on "evidentiary hearings." Pet. 3. When the district court affirmed denial of Lloyd's motion to dismiss, it also granted Lloyd's motion for leave to file an interlocutory appeal. On September 4, 1996, the

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[4] Leslie also named his Members' Agent, R.W. Sturge & Co., as a defendant but dismissed Sturge from the action "for reasons of litigation strategy." Pet. App. 30a n.2.

[5] The only "evidentiary hearing" (Pet. 3) held in Leslie occurred in connection with a preliminary injunction application made by Leslie while Lloyd's motion for reconsideration of its motion to dismiss was pending. Leslie sought an injunction that would have prevented Lloyd's from drawing upon a letter of credit that he arranged to be issued to Lloyd's to secure his underwriting obligations to insureds. The district court denied his request for an injunction, and the Fifth Circuit subsequently affirmed that denial. Pet. App. 93a.

Fifth Circuit certified for appeal the district court's order denying enforcement of the Choice Clause and denying dismissal based on grounds of forum non conveniens.[6] No other issues presented to the district court were certified for appeal.

The Haynsworth Case. On January 26, 1996, seventy-seven Names filed suit against Lloyd's in the United States District Court for the Southern District of Texas, alleging fraud, breach of fiduciary duty, and violations of the DTPA and the Texas Securities Act (Tex. Rev. Civ. Stat. Ann. art. 581-1 et seq. (West Supp. 1997)). Fifty-three of the Haynsworth plaintiffs had previously challenged enforcement of the Choice Clause unsuccessfully in other federal actions against Lloyd's. The Haynsworth plaintiffs did not assert federal securities law claims.

Lloyd's moved to dismiss the Haynsworth action on the grounds that the Choice Clause and the doctrine of forum non conveniens required plaintiffs to adjudicate their claims against Lloyd's in English courts in accordance with English law. Lloyd's also asserted that the Haynsworth plaintiffs who had already unsuccessfully challenged enforcement of the Choice Clause in prior suits against Lloyd's were estopped from relitigating that issue.

On July 15, 1996, the Haynsworth district court (Hughes, J.) held that the Choice Clause was enforceable, and thus dismissed the action. The district court specifically rejected Petitioners' contention that the Choice Clause had been procured by fraud and that enforcement of the Choice Clause would violate a strong public policy of Texas embodied in either the Texas

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[6] The Fifth Circuit had denied without prejudice Lloyd's first petition for leave to file an interlocutory appeal because the district court had not identified which of the issues it had decided were controlling questions of law apt for interlocutory appeal. The district court subsequently entered an amended order identifying the controlling issues of law certified for appeal.

securities laws or the DTPA.[7] Pet. App. 116a-118a. The district court alternatively held that the doctrine of forum non conveniens also required dismissal of the action. Id. at 119a-120a.

The Appeal. On April 15, 1997, the Fifth Circuit granted Lloyd's motion to consolidate the appeals in Leslie and Haynsworth.[8] On April 29, the court of appeals heard oral argument from the parties and from the Securities and Exchange Commission ("SEC"), which had obtained the court's permission to participate in the hearing as an amicus curiae, opposing enforcement of the Choice Clause. The SEC also submitted to the Fifth Circuit a copy of the amicus brief it had previously filed in a Ninth Circuit appeal from a California district court's decision enforcing the Choice Clause. Richards v. Lloyd's of London, No. 94-1211-IEG (POR), 1995 WL 465687 (S.D. Cal. May 1, 1995). Shortly before argument in this case, a divided Ninth Circuit panel had reversed in part the Richards district court, holding that the anti-waiver provisions of the federal securities laws barred enforcement of the Choice Clause simply because the federal securities laws were alleged to apply. Richards v. Lloyd's of London, 107 F.3d 1422 (9th Cir. 1997) ("Richards I"). The SEC, along with Petitioners, urged the Fifth Circuit to follow Richards I.[9] On February 3, 1998, an en banc panel of the Ninth

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7 The district court also held that those plaintiffs who had already litigated the enforceability of the Choice Clause in other actions were barred from doing so again. Pet. App. 118a.

8 Forty-three of the original appellants withdrew their appeal.

9 The SEC had previously filed its Richards amicus brief in the Allen case, in which the Fourth Circuit enforced the Choice Clause. Allen v. Lloyd's of London, 94 F.3d 923 (4th Cir. 1996), mandamus denied, 117 S. Ct. 2497 (1997). The SEC opposed the grant of rehearing en banc in Richards, and argued before the en banc panel of the Ninth Circuit that reviewed, and ultimately withdrew, Richards I.

Circuit withdrew Richards I, and issued an opinion holding the Choice Clause to be enforceable. Nos. 95-55747, 95-56467, 1998 WL 39231 (9th Cir. Feb. 3, 1998) (en banc) ("Richards II").

Decision Below. On August 29, 1997, a unanimous panel of the U.S. Court of Appeals for the Fifth Circuit (Smith, Barksdale, & Benavides, JJ.) held that the Choice Clause was enforceable, thereby reversing the Leslie district court judgment and affirming the Haynsworth district court judgment. Finding the agreements at issue to be truly international, the Fifth Circuit held that this Court's decisions in Bremen and Scherk were controlling, and that the Petitioners had failed to meet their heavy burden of demonstrating that enforcement of the Choice Clause would be "unreasonable," as those decisions require. Pet. App. 10a.

Specifically, the Fifth Circuit held that Petitioners had failed to establish that enforcement of the Choice Clause would be contrary to the public policies embodied in the anti-waiver provisions of the federal and Texas securities laws, and the DTPA. Noting that this Court in Scherk had declined to reach or express any view as to whether the Exchange Act applied to plaintiff's claims in that case, the Fifth Circuit did not express any view as to the merits of Petitioners' claims, including whether any aspect of a Name's involvement in the Lloyd's market constitutes a "security" under either the federal or state securities laws, or a consumer transaction under the DTPA. Pet. App. 18a.[10] The Fifth Circuit concluded, based on Scherk, that neither the anti-waiver provisions of the federal or state securities laws,

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[10] Lloyd's vigorously disputes any contention that either the federal or state securities laws or the DTPA have any application to a Name's participation in the Lloyd's market, including the notion that any aspect of a Name's involvement in the Lloyd's market constitutes a security or a consumer transaction.

nor the anti-waiver provisions of the DTPA, constituted a bar to enforcement of the Choice Clause merely because claims under those statutes had been asserted. The Fifth Circuit recognized that any other conclusion would "'exalt[] the primacy of United States law over the laws of other countries,'" in direct contravention of Scherk and Bremen. Pet. App. 19a (quoting Scherk, 417 U.S. at 517 n.11).

The Fifth Circuit further concluded that, under Bremen and Scherk, an international forum agreement, such as the Choice Clause, cannot be circumvented simply because certain statutory remedies are unavailable in the chosen forum. Pet. App. 19a. In that regard, the Fifth Circuit noted the fairness of the English legal system and determined that the remedies available to Petitioners in England were "adequate to protect their interests and the policies behind the statutes at issue." Id. 25a.

The Fifth Circuit also held that Petitioners had not shown that they had been fraudulently induced into agreeing to litigate disputes with Lloyd's in England, under English law, as required by this Court in Scherk and Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967). The Fifth Circuit properly applied Scherk and Prima Paint to require Petitioners to demonstrate fraud going directly to the procurement of the Choice Clause in order to establish the unreasonableness of enforcing it, and determined that Petitioners had failed, as a matter of law, to do so. Pet. App. 12a-15a.[11]

Petitioners sought rehearing and/or rehearing en banc on September 11, 1997. On October 13, 1997, the Fifth Circuit

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[11] Because the Choice Clause was enforced, the Fifth Circuit found it unnecessary to address whether the action should also be dismissed pursuant to the doctrine of forum non conveniens, as the Haynsworth district court had held. Pet. App. 7a & n.7.

denied that request. Pet. App. 127a. On January 12, 1998, Petitioners submitted the Petition to this Court.

REASONS FOR DENYING THE PETITION

There is no compelling reason for this Court to grant review of the Fifth Circuit's decision. In enforcing the Choice Clause, the Fifth Circuit faithfully applied controlling precedent of this Court. Specifically, in Scherk, this Court rejected the very same contention advanced by Petitioner Leslie here: that a commitment contained in an international agreement to adjudicate claims relating to the agreement in a foreign tribunal may be vitiated simply by alleging that the federal securities laws apply to his claims. Scherk applies with equal—if not greater—force to the state law claims asserted by the Petitioners. The Fifth Circuit properly found that Scherk was controlling as to the contention that the enforcement of the Choice Clause was barred by the anti-waiver provisions of the federal and state statutes alleged to apply here.

Petitioners also contend that the Fifth Circuit's ruling was inconsistent with dictum in Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987), Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995), and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). There is no such inconsistency. In these decisions, this Court enforced forum selection agreements in situations in which such agreements had previously been deemed unenforceable. Indeed, since Bremen, this Court has never declined to enforce a forum selection agreement made in the context of an international transaction.

Nor is there any split of authority between the circuits. The Fifth Circuit's decision is fully consistent with the decisions of the six other courts of appeals that have considered the enforceability of the Choice Clause. See supra note 1 (citing Choice Clause cases). Each of these courts explicitly rejected the contention that the anti-waiver provisions and/or general policies

of the federal and/or state securities laws permit Names to avoid their "solemn promise" to litigate in England (see Scherk, 417 U.S. at 519) simply by alleging that their participation in the Lloyd's market involved the sale of a security. These cases are indistinguishable from the case at bar.

Petitioners heavily rely on the Richards I opinion, holding the Choice Clause unenforceable as to federal securities law claims, in seeking review of the Fifth Circuit's ruling in this case, noting the "conflict" between Richards I and the ruling below. That conflict no longer exists. The Ninth Circuit en banc panel has since withdrawn Richards I and has held, as the Fifth Circuit did, that the Choice Clause is enforceable when the federal securities laws are alleged to apply. Richards II, 1998 WL 39231 at *1.

There is also no compelling basis for this Court to review the Fifth Circuit's rejection of Petitioners' claim that their assent to the Choice Clause was induced by fraud. Scherk and Prima Paint make clear that Petitioners' allegations of fraud are insufficient, as a matter of law, to invalidate the Choice Clause. The Fifth Circuit's decision in this regard is consistent with that of the four other courts of appeals that have addressed, and rejected, identical allegations of fraud in the procurement of the Choice Clause. Richards II, 1998 WL 39231 at *7-8; Tufts v. Corporation of Lloyd's, 128 F.3d 793 (2d Cir. 1997), aff'g per curiam 981 F. Supp. 808, 813-14 (S.D.N.Y. 1996); Bonny, 3 F.3d at 159-60; Riley, 969 F.2d at 960.

This Court has declined—in Riley, Roby, Bonny, and Allen—to review decisions enforcing the Choice Clause each of the four times such review was sought. It should do so again.

I. THE FIFTH CIRCUIT PROPERLY HELD THAT THE CHOICE CLAUSE COULD NOT BE AVOIDED MERELY BY ALLEGING CLAIMS UNDER STATUTES WITH ANTI-WAIVER PROVISIONS

The Fifth Circuit properly recognized that "the basic framework" for analyzing whether the Choice Clause is enforceable is "the strong presumption of enforceability established by Bremen and Scherk." Pet. App. 18a. In M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), this Court firmly established that forum selection clauses contained in international agreements are entitled to a strong presumption of enforceability. Accordingly, such clauses must be "specifically [enforced] unless the party resisting enforcement could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." Id. at 15. Just two years after Bremen was decided, this Court in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), held that the principles set forth in Bremen also governed the enforceability of a "truly international" forum agreement when the plaintiff alleges that the federal securities laws apply to the dispute. Id. at 509, 514-15.

The strong presumption of enforceability derives not only from a general respect for contract but from the specific needs of international commerce. As the Court stated in Bremen:

> We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

407 U.S. at 9. Likewise in Scherk, the Court recognized that

> [a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost

> indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

417 U.S. at 516.

The presumption of enforceability accorded to an international forum agreement is even stronger in this case than in an ordinary commercial agreement. By executing the General Undertaking, Petitioners agreed to abide by English statutes, and by rules and regulations promulgated by Lloyd's, as regards their underwriting business in an English insurance market. The Choice Clause is therefore critical to Lloyd's ability to regulate the marketplace—which includes Names from approximately eighty different countries—effectively and consistently. As an English court has ruled:

> The clear and simple purpose of this agreement, aptly called an undertaking, was to ensure that on his becoming a Name [defendant] became subject to the regulatory regime of Lloyd's. The clauses governing choice of law and venue were ancillary to that object.

Society of Lloyd's v. Clementson, [1995] LRLR 307 (C.A. Nov. 10, 1994) (LEXIS, Enggen Library, Cases File).

Claims by Names arising out of their underwriting or membership in Lloyd's "'aim[] at the heart of the unique self-regulatory mechanism within Lloyd's, which is a product of complex English legislation.'" Pet. App. 5a-6a (quoting Hirsch v. Oakeley Vaughan Underwriting Ltd., No. 89-2563, slip op. at 7 (5th Cir. May 31, 1990)). It would be completely anomalous to allow U.S. courts under U.S. law to adjudicate disputes between U.S. Names and Lloyd's when the regulatory relationship at the heart of the dispute was created by, and is governed by, English law. Such a result would ultimately lead to Names, solely by

vagary of residence, having different rights and obligations to policyholders and Lloyd's.

A. The Fifth Circuit Properly Applied Scherk to the Federal Securities Claim

Petitioner Leslie's claim that section 29(a) of the Exchange Act, i.e., the "anti-waiver" provision, makes the Bremen presumption of enforceability inapplicable was precisely the question considered and answered in Scherk.[12] Specifically, this Court in Scherk rejected the argument that section 29(a) precluded dismissal of claims asserted under section 10(b) of the Exchange Act in favor of the contractually chosen forum in Paris. 417 U.S. at 509, 514-15. As the Fifth Circuit properly recognized, Scherk is "directly on point." Pet. App. 24a. See also Richards II, 1998 WL 39231 at *5 ("We follow our six sister circuits that ruled to enforce the choice clause . . . because we apply Scherk.").

None of Leslie's attempts to distinguish Scherk has any merit.

1. The Choice Clause Is a Truly International Agreement

Leslie tries to avoid application of Scherk by arguing that his relationship with Lloyd's does not involve "the type of 'international business transaction' contemplated in Scherk." Pet. 16. The Fifth Circuit aptly noted that "[t]he most charitable adjective with which to describe [this] argument is 'disingenuous,'" because it is

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12 Of the 28 Petitioners, only Leslie has alleged violations of the Exchange Act, despite the Petition's repeated references to "Petitioners' substantive Exchange Act rights." See, e.g., Pet. 11.

> sufficiently obvious that an agreement is "international" when it involves an American Name's underwriting international insurance policies in an English market pooling resources with other Names from over eighty countries and all the while explicitly agreeing to be bound by English law.

Pet. App. 20a. See also Richards II, 1998 WL 39231 at *4 ("Entering into the Lloyd's market . . . is plainly an international transaction."); Bonny, 3 F.3d at 159 n.9 ("There is no question that the transaction involved here is truly international."); Roby, 996 F.2d at 1362-63; Riley, 969 F.2d at 957 ("[The] agreement is truly international").

Leslie's attempt to obscure the international nature of his agreements with Lloyd's by focusing only on alleged U.S. conduct is futile. Pet. 16-18. In Bremen, this Court reversed an appellate decision holding that a forum selection agreement requiring litigation in England should not be enforced because U.S. contacts predominated over any English contacts. 407 U.S. at 7-8. The facts underlying Scherk likewise demonstrate that the relevant inquiry is not which country has the most contacts, but whether the transaction "touches two or more countries, each with its own set of substantive laws and conflicts of laws rules." 417 U.S. at 516.[13]

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[13] In Scherk, the plaintiff was an American company and the principal negotiations occurred in the United States, but both the defendant, and the businesses sold to the plaintiff in the disputed transaction, were Europe-based. Alberto-Culver Co. v. Scherk, 484 F.2d 611, 613-14 (7th Cir. 1973), rev'd, 417 U.S. 506 (1974).

2. The Choice Clause Is Enforceable Without Determining or Assuming That the Transactions at Issue Are Subject to the Federal Securities Laws

Leslie also attempts to distinguish Scherk by erroneously asserting that this Court's holding in that case was premised on its conclusion that the federal securities laws would be applied by the arbitrators in Paris. Pet. 13. Based on this misreading of Scherk, Leslie argues that the Fifth Circuit was required either to assume the truth of his allegation that the federal securities laws applied to his participation in the Lloyd's market or to give dispositive weight to the Leslie district court's ruling that his complaint stated a claim under the Exchange Act. Pet. 10-11. The Fifth Circuit, relying on Scherk, properly rejected this contention.[14]

In enforcing the international forum agreement in Scherk, this Court did "not reach, or imply any opinion as to, the question whether the acquisition of Scherk's business was a security transaction." 417 U.S. 506, 514 n.8 (1974). In so holding, this Court rejected the reasoning of the Seventh Circuit, which had held that the question of enforceability "turns on whether the transaction here in issue involves 'securities' within the purview of section 10(b). . . ." Alberto-Culver, 484 F.2d at 615. After concluding that securities were involved, the Seventh Circuit found Bremen inapplicable and instead found Wilko v. Swan, 346 U.S. 427 (1953)—which had barred enforcement of an arbitration

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[14] The Haynsworth district court, like this Court in Scherk, did not decide or assume the merits of Petitioners' claim that the Texas securities and consumer fraud statutes have any application here. Pet. App. 111a-114a (describing, but not passing judgment upon, plaintiffs' various purported claims). The Leslie district court's interlocutory ruling on the motion to dismiss for failure to state a claim under the Exchange Act—even if it were relevant, which it is not—does not apply to any Petitioner other than Leslie.

clause in a domestic securities case—to be dispositive. Alberto-Culver, 484 F.2d at 615.

Reversing, this Court found that the international nature of the agreement in Scherk "involve[d] considerations and policies significantly different than those found controlling in Wilko." 417 U.S. at 515. In particular, the Court noted that:

> In Wilko . . . there was no question but that the laws of the United States generally, and the federal securities laws in particular, would govern disputes arising out of the stock-purchase agreement. . . . In this case, by contrast . . . in the absence of the arbitration provision considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to the resolution of disputes arising out of the contract.

Id. at 515-16.[15] It was precisely because the transaction in Scherk "touch[ed] two or more countries" that the Court declined to decide or assume whether the federal securities laws applied to the transaction at issue. Id. at 516. Consequently, under Scherk, the anti-waiver provisions of the federal securities laws (or any other statute) may not be given dispositive weight in determining the enforceability of an international forum clause.

Leslie also contends that Shearson/American Express v. McMahon, 482 U.S. 220 (1987), bars enforcement of a forum selection clause if the chosen forum will not apply the federal securities laws to the dispute. Pet. 13-14. According to Petitioners, McMahon allows "procedural rights" to a judicial forum to be waived only when it is certain that the "substantive

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[15] Wilko has since been overruled. Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 485 (1989).

rights" purportedly guaranteed by the securities laws will be applied in the designated forum. Id. at 12-15. McMahon, however, did not involve an international agreement but rather a purely domestic transaction to which the federal securities laws indisputably applied. McMahon, 482 U.S. at 228-29. Consequently, McMahon provides no support for the argument that international forum clauses may only be enforced when the chosen forum is certain to apply American statutory rights, for the simple reason that this question—which had already been answered in the negative by Scherk—was not before the McMahon Court.[16]

Petitioners' reliance on dicta in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), is equally misplaced. Mitsubishi enforced an international arbitration clause in a case involving anti-trust counterclaims, overruling a line of lower court decisions holding anti-trust claims to be non-arbitrable. Id. at 640. The parties had agreed that, despite a provision requiring the Japanese arbitrators to apply Swiss law, the anti-trust counterclaims would also be submitted for arbitration. The following footnote was therefore pure dictum:

> [I]n the event the choice of forum and choice of law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for anti-trust violations we would have

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16 Petitioners cite language in McMahon that they claim limits Scherk to cases in which a plaintiff's rights under the federal securities laws will be enforced in the chosen forum. Pet. 13 (citing McMahon, 482 U.S. at 229). Scherk itself is inconsistent with this contention. In Scherk, a choice of law clause requiring the Parisian arbitrators to apply Illinois law to any disputes (417 U.S. at 508) did not assure that the arbitrators would apply the federal securities laws, or even consider the Exchange Act claims, as the dissent pointedly noted. Id. at 532-33 & n.11 (Douglas, J., dissenting).

> little hesitation in condemning the agreement as against public policy.

Id. at 637 n.19.[17] The Fifth Circuit properly recognized that this dictum "is limited to the antitrust context" even if read broadly. Pet. App. 22a. Like the Fifth Circuit, the other courts of appeal that have considered whether the Mitsubishi dictum precludes enforcement of the Choice Clause have held that it does not. Richards II, 1998 WL 39231 at *6; Bonny, 3 F.3d at 160; Shell, 55 F.3d at 1230-31; Roby, 996 F.2d at 1364-65; Riley, 969 F.2d at 959-60. Petitioners' attempt to apply the Mitsubishi dictum to the Choice Clause flies in the face of Scherk, in which this Court recognized, in the context of the claimed application of the anti-waiver provisions of the federal securities laws, that

> [a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

417 U.S. at 516 (emphasis supplied).[18]

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17 The cases cited in the Mitsubishi footnote to support the "prospective waiver" dictum do not involve forum selection or choice of law clauses but instead involve general releases of any future claims. See, e.g., Reidel's Inc. v. General Elec. Co., 498 F.2d 95 (5th Cir. 1974). By executing the Choice Clause, however, Petitioners have not released any claims and have not been left without remedies for alleged fraud. See infra § I.C, at p. 23.

18 Petitioners also rely on dictum in Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995), to support their contention that the Choice Clause constitutes an impermissible waiver of statutory rights. Pet. 7-9. This reliance is misplaced. In Vimar, this Court overruled a long line of lower court precedents that had voided forum agreements under the Carriage of Goods by Sea Act

Footnote continued

Petitioners' argument is equally inconsistent with Bremen. In Bremen, the contract at issue did not contain an express choice of law provision, but this Court recognized that the choice of an English forum was essentially a choice of English law as well. 407 U.S. at 13 n.15. The Court thus found that it was "reasonable to conclude that the forum clause was also an effort to obtain certainty as to the applicable substantive law." Id. Although the Court explicitly recognized that application of English law would be outcome determinative and yield results different from those that would obtain under U.S. law (id. at 8 & n.8), it nonetheless enforced the forum agreement.

In short, United States public policy does not preclude parties to an international transaction from resolving in advance any uncertainty as to potential conflicts of law in favor of application of foreign law. As the Fifth Circuit aptly noted:

> It defies reason to suggest that a plaintiff may circumvent forum selection . . . clauses merely by stating claims under laws not recognized by the forum selected in the agreement. A plaintiff would simply have to allege violations of his country's tort law or his country's statutory law or his country's property law in order to render nugatory any forum selection clause that implicitly or explicitly required the application of the law of another jurisdiction. We

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("COGSA"), and enforced forum selection and choice of law provisions requiring adjudication in Japan. Because COGSA is an implementation of an international treaty intended to create uniform rights and obligations amongst the signatory nations, Vimar neither displaces nor modifies Bremen or Scherk. As the Fifth Circuit recognized, "COGSA, unlike the American securities statutes or the Texas laws . . . [embodies] an international scheme the very nature of which would be frustrated by permitting parties to opt out of it." Pet. App. 23a.

> refuse to allow a party's solemn promise to be defeated by artful pleading.

Pet. App. 24a-25a (quoting Roby, 996 F.2d at 1360); see also Richards II, 1998 WL 39231 at *4 (same).

B. The Fifth Circuit Properly Applied Scherk to the State Statutory Claims

As noted above, the Fifth Circuit also properly rejected Petitioners' claims that the "anti-waiver" provisions of the Texas "Blue Sky" statute and the DTPA authorized them to litigate in Texas in violation of their solemn agreement to litigate exclusively in England. The Fifth Circuit correctly held that the principles set forth in Bremen and Scherk apply in diversity actions in which the plaintiffs assert claims under state statutes. Pet. App. 8a-9a. Consequently, Scherk controls the enforceability of the Choice Clause as to the Petitioners' Texas statutory claims. Indeed, this Court's decision in Scherk applies with even greater force to the Texas statutory provisions Petitioners invoke. See Gau Shan Co. v. Bankers Trust Co., 956 F.2d 1349, 1358 (6th Cir. 1992) ("When weighed against the concerns of international comity, the public policies of a state deserve less weight than the public policies of the nation."); Shell, 55 F.3d at 1231 (holding that plaintiffs had not proved that the public policy underlying Ohio securities laws outweighed the policy behind "supporting the integrity of international agreements" like the Choice Clause).[19]

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[19] While Petitioners argue that the "Texas courts have consistently upheld the legislature's edict" by enforcing the anti-waiver provisions (Pet. 10), that assertion is both irrelevant in a diversity case and wrong as a matter of Texas law. The Texas courts have squarely held that "[c]ontractually selecting a forum for future litigation is not an impermissible waiver of rights under the DTPA . . . ." Accelerated Christian Educ., Inc. v. Oracle Corp., 925 S.W.2d 66, 74 (Tex. App. 1996, no writ) (emphasis supplied). The Texas federal courts have reached the same conclusion in cases

Footnote continued

Furthermore, all but three of the Petitioners are barred by collateral estoppel from challenging the enforceability of the Choice Clause as to their Texas Blue Sky claims because they previously raised state securities law claims in the Richards litigation that were dismissed on the basis of the Choice Clause. Pet. 21 n.9. Although the Fifth Circuit found it unnecessary to address the collateral estoppel issue in light of its ruling on the Choice Clause (Pet. App. 7a n.7, 119a-123a), collateral estoppel provides an independent basis for dismissal of most of Petitioners' claims. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

C. Petitioners Have Adequate Remedies for Their Claims in the English Courts

The Fifth Circuit correctly determined that the "remedies in England are adequate to protect [Petitioners'] interests and the policies behind the statutes at issue." Pet. App. 25a. The six other appellate courts that have enforced the Choice Clause reached the same conclusion, recognizing that Names have significant remedies against Lloyd's for fraud in the English courts.[20] Richards II, 1998 WL 39231 at *7; Allen, 94 F.3d at

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Footnote continued from previous page

involving DTPA claims. Hoffman v. Burroughs Corp., 571 F. Supp. 545 (N.D. Tex. 1982); Wydel Assocs. v. Thermasol, Ltd., 452 F. Supp. 739 (W.D. Tex. 1979). Petitioners conspicuously fail to cite any of these cases, and the Texas cases they do cite (Pet. 9-10) have absolutely nothing to do with the enforcement of forum selection agreements.

20 Petitioners misstate Lloyd's amenability to suit in England under English law. Pet. 5. Lloyd's has no immunity under English law from claims that it acted "in bad faith." Lloyd's Act 1982 §14; Richards II, 1998 WL 39231 at *7. Names may also sue their Members' and Managing Agents for breach of fiduciary duty and negligence. Richards II, 1998 WL 39231 at *7 & n.6.

929; Shell, 55 F.3d at 1231; Bonny, 3 F.3d at 161; Roby, 996 F.2d at 1365-66; Riley, 969 F.2d at 958.

The Fifth Circuit properly rejected the contention that any specific differences between the remedies available to Names in England and the remedies that the federal securities statutes might provide prevent enforcement of the Choice Clause:

> We refuse to accept the notion . . . that the sheer scope of U.S. securities law automatically renders that of other countries inferior or should provide American investors a means to escape their contractual obligations when they begin to prove too costly.

Pet. App. 24a. Any other conclusion would be inconsistent with both Bremen and with Scherk, as it would "reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts. . . .'" Scherk, 417 U.S. at 519 (citing Bremen, 407 U.S. at 9).

II. THE FIFTH CIRCUIT PROPERLY HELD THAT THE CHOICE CLAUSE WAS NOT PROCURED BY FRAUD

Three of the Petitioners also attack the Choice Clause as the product of fraud. See supra note 2. In Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), and Scherk, this Court held that forum agreements are unenforceable on grounds of "fraud and overreaching" only "if the inclusion of that clause in the contract was the product of fraud or coercion." Scherk, 417 U.S. at 519 n.14 (emphasis in original) (citing Prima Paint, 388 U.S. at 404 & n.11). As this Court recognized in Scherk, the exception set forth in Bremen to enforcement of forum agreements for fraud or overreaching "does not mean that anytime a dispute arising out of a transaction is based upon an allegation of fraud, as in this case, the clause is unenforceable." Scherk, 417 U.S. at 519 n.14.

The Fifth Circuit properly applied Prima Paint and Scherk in rejecting Petitioners' generalized allegations of fraud as grounds to invalidate the Choice Clause. Pet. App. 11a-17a. Like the Fifth Circuit, the Second, Ninth, and Tenth Circuits have rejected, based on Prima Paint and Scherk, identical claims of fraud in the inducement of the Choice Clause. See Richards II, 1998 WL 39231 at *7-8; Tufts v. Corporation of Lloyd's, 128 F.3d 793 (2d Cir. 1997), aff'g per curiam 981 F. Supp. 808, 813 (S.D.N.Y. 1996); Riley, 969 F.2d at 960. Cf. Bonny, 3 F.3d at 160 n.10.

A. The Fifth Circuit Properly Applied Prima Paint

Petitioners contend that the Fifth Circuit erred in applying Prima Paint to this case because Prima Paint applies only to arbitration clauses governed by the Federal Arbitration Act ("FAA"), not to judicial forum selection agreements like the Choice Clause. Pet. 22. This argument is specious because, as Prima Paint itself makes clear, the FAA makes arbitration agreements as enforceable as—but no more enforceable than—other contractual provisions, including judicial forum selection agreements. 388 U.S. at 404 n.12 (citing 9 U.S.C. § 2). In Scherk, this Court extended to arbitration clauses the Bremen criteria for assessing the enforceability of judicial forum agreements, holding that arbitration clauses are simply "a specialized kind of forum-selection clause." Scherk, 417 U.S. at 519 & n.14. See also Vimar, 515 U.S. at 534 ("[F]oreign arbitration clauses are but a subset of foreign forum selection clauses in general."). The appellate courts have uniformly held that Prima Paint's specificity requirement applies to agreements to litigate in judicial as well as arbitral fora. See, e.g., Richards II, 1998 WL 39231 at *8; Riley, 969 F.2d at 960.

Petitioners further suggest that Prima Paint should not apply to judicial forum clauses because courts do not retain jurisdiction, as they do in the arbitral context, to ensure that the fraud claims have been properly addressed. Pet. 22. While it is true that a court may have an opportunity to review an arbitral

award prior to its confirmation, a court's ability to vacate the award is limited by the FAA to narrowly prescribed instances, such as when the award itself was procured by fraud, when there is evident partiality or misconduct by the arbitrators, or when the arbitrators refused to hear material evidence. 9 U.S.C. § 10. This narrow scope of review does not permit de novo review of the merits of the arbitrator's award or of any finding concerning a claim of fraud in the inducement of the contract. Pet. 22.

B. The Fifth Circuit's Application of Prima Paint Is Consistent with Moseley

Contrary to Petitioners' contention, the Fifth Circuit's application of Prima Paint is fully consistent with this Court's earlier decision in Moseley v. Electronic & Missile Facilities, Inc., 374 U.S. 167 (1963). Moseley does not hold that generalized assertions that a forum selection agreement was part of a broader fraud concerning the underlying contract suffice to invalidate the forum agreement. Rather, in Moseley, in which Petitioners had alleged that both the arbitration agreement and the underlying agreement had been procured by fraud, the Court simply held that the allegations relating to the arbitration agreement should be determined by the district court in advance of an assessment of any other issues in that case. Id. at 171.[21] Thus, Prima Paint's rule that a court may only assess whether the making of the forum agreement was fraudulent is entirely consistent with this Court's decision in Moseley, and this Court in Prima Paint so recognized. Prima Paint, 388 U.S. at 404 n.12. See also Richards II, 1998 WL 39231 at *8 (rejecting interpretation of Moseley that Petitioners advance here); Campaniello Imports, Ltd. v. Saporiti Italia S.p.A., 117 F.3d 655, 668 (2d Cir. 1997) (holding that, under Prima Paint and Moseley,

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[21] Notably, in Moseley, no party had sought to enforce the arbitration clause, and the Court was not ruling on the merits of the allegations of fraud in the inducement. 374 U.S. at 168.

a party seeking to avoid a forum selection clause must prove "some nexus between the alleged fraud or misrepresentation and the arbitration clause in particular" which may not be established by simply alleging that the "clause was a part of the overall scheme to defraud.").[22]

Unlike the district court in Moseley, the Fifth Circuit has already found that, as a matter of law, Petitioners made no allegations of fraud directed to the Choice Clause. Pet. App. 12a-16a. It specifically rejected the contention that Lloyd's alleged characterization of the 1986 General Undertaking as containing "few variations of substance" from prior agreements signed by Names (Pet. 6-7) was a fraudulent misrepresentation specific to the Choice Clause.[23] Pet. App. 14a-15a. Likewise, the Fifth Circuit rejected Petitioners' claim that Lloyd's alleged failure to affirmatively explain the legal import of the Choice Clause establishes fraud specific to the Choice Clause:

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22 Petitioners contend that C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette, 912 F.2d 1563 (6th Cir. 1990), is inconsistent with the Fifth Circuit's ruling and creates a split of appellate authority as to the proper application of Prima Paint. Pet. 23. Petitioners are wrong. C.B.S. is consistent both with Prima Paint's specificity requirement and with the decisions of other appellate courts interpreting that requirement. The Sixth Circuit in C.B.S. merely held that when "the plaintiff affirmatively pleads that the contract and the arbitration agreement included therein were procured through fraud, the court should determine whether the arbitration clause was used to further the fraudulent scheme." 912 F.2d at 1568. The Sixth Circuit thus remanded the case to the district court for a determination as to whether plaintiffs could substantiate any claims of fraud specific to the arbitration clause. The Sixth Circuit did not hold that allegations that a forum clause was part of a fraudulent scheme sufficed, by themselves, to invalidate the clause.

23 Moreover, as both the Leslie district court and the Fifth Circuit noted, this statement was allegedly made by Petitioners' Members' Agent, not by Lloyd's. Pet. App. 14a n.14.

> [t]he plaintiffs were sophisticated parties contracting voluntarily; it is not for us to impose a duty upon one party to counsel the other as to the risks and benefits of a contract. . . . The duty was the plaintiffs' to read the plain terms of the agreement, not Lloyd's to lecture them about it.

Pet. App. 15a. See also Tufts v. Corporation of Lloyd's, 981 F. Supp. at 813 (S.D.N.Y. 1996) ("Lloyd's was not in a fiduciary relationship with Plaintiffs and had no duty to explain the effect of the choice clauses to them."), aff'd per curiam, 128 F.3d 793 (2d Cir. 1997); Bonny, 3 F.3d at 156 n.10 ("Nothing excuses the plaintiffs for not being aware of the substantive provisions of English law that the forum selection clause incorporates into their agreement").

The Fifth Circuit also rejected the claim that the 1986 General Undertaking was a "take-it-or-leave-it" offer that renders the Choice Clause the product of "overreaching." Pet. 21. Like Petitioners' claims of fraudulent inducement, the facts relied upon to support their allegations of overreaching are in no way specific to the Choice Clause, but relate to the circumstances surrounding the contract as a whole, as the Fifth Circuit properly found. Pet. App. 16a. Even if these allegations were directed specifically at the Choice Clause, the Fifth Circuit properly recognized that Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991), in which this Court enforced a forum selection clause contained in an agreement that had not been subject to negotiation, would nevertheless require it to reject Petitioners' claim of overreaching. Id.

CONCLUSION

For all the foregoing reasons, this Court should deny the Petition for a writ of certiorari.

Dated: March 9, 1998

Respectfully submitted,

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R1

[SEAL]

GENERAL UNDERTAKING

This Undertaking is made the _____ day of _____, 19__ between:

(1) The Society of Lloyd's incorporated by Lloyd's Act 1871 ("Lloyd's" (which expression shall include any officer or employee of Lloyd's, any person in or to whom whether individually or collectively any powers or functions are vested or delegated by or pursuant to Lloyd's Acts 1871-1982)) and

(2) Charles Robert Leslie (the "Member") on behalf of himself and his legal and personal representatives and successors.

WHEREAS:

(A) The Lloyd's Acts 1871-1982 conferred powers on the Council of Lloyd's (the "Council") to make byelaws for the purposes provided in such Acts.

(B) Pursuant thereto the Council duly made the Membership Byelaw (No. 9 of 1984) on 12th November, 1984 (the "Byelaw") prescribing inter alia requirements to be satisfied or complied with as a continuing condition of membership of, and of underwriting insurance business at, Lloyd's.

(C) The Member is or, as the case may be, is to become a member of Lloyd's.

(D) Pursuant to the provisions of the Byelaw and in consideration of the Member's admission to membership of, and/or of underwriting insurance business at, Lloyd's or, as the case may be, continuing membership of, and/or of underwriting insurance at, Lloyd's, the Member and Lloyd's consider that it is in their respective interests to become parties to this Undertaking.

NOW THEREFORE IT IS AGREED as follows:

1. Throughout the period of his membership of Lloyd's the Member shall comply with the provisions of Lloyd's Acts 1871-1982, any subordinate legislation made or to be made thereunder and any direction given or provision or requirement made or imposed by the Council or any person(s) or body acting on its behalf pursuant to such legislative authority and shall become a party to, and perform and observe all the terms and provisions of, any agreements or other instruments as may be prescribed and notified to the Member or his underwriting agent by or under the authority of the Council.

2.1 The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.

2.2 Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or proceeding (together in this Clause 2 referred to as "Proceedings") arising out of or relating to such matters shall be brought in such courts and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England and irrevocably waives any objection which it may have now or hereafter to (a) any Proceedings being brought in any such court as is referred to in this Clause 2 and (b) any claim that any such Proceedings have been brought in an inconvenient forum and further irrevocably agrees that a judgment in any Proceedings brought in the English courts shall be conclusive and binding upon each party and may be enforced in the courts of any other jurisdiction.

2.3 The choice of law and jurisdiction referred to in this Clause 2 shall continue in full force and effect in respect of any dispute and/or controversy of whatsoever nature arising out of or relating to any of the matters referred to in this Undertaking notwithstanding that the Member ceases, for any reason, to be a Member of, or to underwrite insurance business at, Lloyd's.

3. If any term of this Undertaking shall to any extent be invalid or unenforceable, the remainder of the Undertaking shall not be affected thereby and each term of this Undertaking shall be valid and be enforceable to the fullest extent permitted by law and a substitute provision shall be negotiated by the parties hereto to preserve as nearly as possible the original intent of this Undertaking.

IN WITNESS whereby the parties hereto have caused this Undertaking to be duly executed on the date first written above.

SOCIETY OF LLOYD'S

By:

Authorised Signatory [SEAL]

By:

Member's Signature

/s/ CHARLES ROBERT LESLIE

Supreme Court, U.S.
FILED
APR 2 1998
OFFICE OF THE CLERK

(4)

No. 97-1283

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STUART HAYNSWORTH, *et al.*,
Petitioners,

v.

LLOYD'S OF LONDON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL AND REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL AND REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

As shown in the Petition for Writ of Certiorari ("Petition" or "Pet."), the Firth Circuit's decision raises two important questions for this Court's review:

> *First*, the Court should grant certiorari to decide whether a foreign defendant—who engaged in a securities offering in the United States—can enforce contractual forum selection clauses that, in tandem with choice of law clauses, waive the substantive rights of United States residents under the Securities Exchange Act of 1934 ("1934 Act") and Texas statutes. (Pet. 8-20).
>
> *Second*, the Court should grant certiorari to decide whether a defendant who employs such contractual clauses as a means to effect a fraudulent scheme may enforce those clauses. (Pet. 21-24).

As to the first question, the Fifth Circuit imposed a judge-made exception to clear statutory provisions, purportedly to accommodate the policy interests of international commerce. As to both questions, the Fifth Circuit's holding conflicts with the rulings of this Court. Both questions are important for determining the role of United States courts in commercial disputes arising from modern, global commerce.

After Petitioners filed their petition, a divided en banc Ninth Circuit enforced Lloyd's contractual Choice Clauses. *See infra* App. A, 1a-25a.[1] The en banc 8-3 decision in *Richards II* does not change the importance, for future cases, of the Questions Presented here, and the Court should grant certiorari to resolve those questions. The Ninth Circuit, recognizing the substantiality of the questions to be presented to this Court, Fed. R. App. P. 41(b), stayed its mandate pending the petition for certiorari in *Richards II*. *Infra* App. B, 26a-27a. The Court should consider this Petition together with the petition that will soon be filed in *Richards II*.

I. THE COURT SHOULD REVIEW THE FIFTH CIRCUIT'S JUDICIAL POLICY RATIONALE FOR ENFORCING THE FORUM SELECTION CLAUSES.

A. The Lower Courts Misunderstand This Court's Construction of the Anti-Waiver Statutes, And Have Misapplied That Construction in Domestic Transactions Involving Foreign Parties.

As the Fifth Circuit acknowledged, "[t]he antiwaiver provisions are straightforward." Pet. 17a-18a. Those statutes void the Choice Clauses. *See* Pet. 8-10. Nevertheless, relying on *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), the Fifth Circuit held that the policy analysis judicially developed in *M/S Bremen v. Zapata*

[1] *Richards v. Lloyd's of London*, —— F.3d —— (9th Cir. Feb. 3, 1998) [hereinafter *Richards II*], *withdrawing* 107 F.3d 1422 (9th Cir. 1997) [hereinafter *Richards I*].

Off-Shore Co., 407 U.S. 1 (1972), supersedes the federal and state anti-waiver statutes in international transactions.[2] That holding conflicts with this Court's construction of the anti-waiver statutes and other statutes that affect forum selection agreements in purely domestic transactions.[3] The Court should determine whether the mere participation by an international party in a domestic securities offering warrants such judicial departure from clear statutory dictates.

The Fifth Circuit's interpretation of *Scherk*, a truly international case with no significant domestic contacts, conflicts with this Court's explanation of *Scherk* in a wholly domestic case arising under a securities anti-waiver statute: *McMahon*. *See* Pet. 12-14. In *McMahon*, the Court explained that *Scherk* upheld a foreign arbitration agreement because, and only because, the foreign arbitral forum provided an adequate means of enforcing the parties' substantive rights under the 1934 Act.

> The decision in *Scherk* thus turned on the Court's judgment that under the circumstances of that case, arbitration was an adequate substitute for adjudication as a means of *enforcing the parties' statutory rights.*

McMahon, 482 U.S. at 229 (emphasis added).

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[2] The court considered Texas statutes solely in applying *federal* forum selection clause standards. Pet. 9a. *Contra Farmland Indus., Inc. v. Frazier-Parrott Commodities, Inc.*, 806 F.2d 848, 852 (8th Cir. 1986) (applying state law, not federal law); *General Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 356-57 (3d Cir. 1986) (same). Texas courts, unlike the Fifth Circuit, do not apply *The Bremen*'s admiralty standards in the face of state anti-waiver statutes. *Pozero v. Alfa Travel, Inc.*, 856 S.W.2d 243, 244-45 (Tex. App. 1993, no writ).

[3] *Shearson/American Express v. McMahon*, 482 U.S. 220, 229, 230-32 (1987); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989); *Stewart Organization v. Ricoh Corp.*, 487 U.S. 22, 28-29 (1988).

Without mentioning *McMahon*, however, the Fifth Circuit asserted that "the Supreme Court has never overruled, or indeed even expressly limited, either *The Bremen* or *Scherk*." Pet. 23a. The Ninth Circuit in *Richards II*, and other circuits,[4] likewise ignored *McMahon*'s explanation of *Scherk*. Lloyd's does not defend the Fifth Circuit's disregard of *McMahon*. Rather, Lloyd's contends that *McMahon* "provides no support" for enforcing the anti-waiver statutes in transactions between foreign and domestic parties because *McMahon* "did not involve an international agreement but rather a purely domestic transaction to which the federal securities laws indisputably applied." Brief of Respondent Lloyd's in Opposition ("Opp.") 18-19.

Lloyd's is wrong, and the *en banc* Eleventh Circuit has read *McMahon* differently. "In *McMahon*, the Supreme Court . . . discarded the distinction between domestic and international transactions . . . ." *Kotam Elecs., Inc. v. JBL Consumer Prods., Inc.*, 93 F.3d 724, 727 & n.5 (11th Cir. 1996) (en banc), *cert. denied*, 117 S. Ct. 946 (1997). This Court should resolve the circuit's different interpretations of *McMahon*, and should make clear that *McMahon*'s construction of the anti-waiver statutes controls domestic securities offerings, not only by domestic securities sellers but also by international sellers in domestic transactions.[5]

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[4] *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.), *cert. denied*, 506 U.S. 1021 (1992); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir.), *cert. denied*, 510 U.S. 945 (1993); *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996), *mandamus denied sub nom. In re Allen*, 117 S. Ct. 2497 (1997).

[5] This Court's review is important for another reason: the Fifth Circuit improperly disregarded the *Leslie* district court's factual finding, supported by substantial evidence, that Lloyd's solicited Names in the United States to buy investment contract "securities." Pet. 39a, 53a-56a, 64a-67a. The decision to disregard that finding and evidence conflicts with other circuit holdings that a plaintiff "is entitled to the resolution in its favor of all disputes concerning

In other contexts, the Court has ruled that federal statutes override judicial enthusiasm for forum selection clauses in transactions between domestic parties only. *Stewart* held that *The Bremen*'s judicially-created standards did not compel enforcement of such clauses where Congress had enacted 28 U.S.C. § 1404 to address the "immediate issue before the Court." *Stewart*, 487 U.S. at 28. The Fifth Circuit ignored *Stewart* entirely, and Lloyd's does not respond to *Stewart* in opposing certiorari. The Court should decide whether *Stewart*'s judicial deference to statutes controls disputes arising from domestic transactions that involve international parties.

B. The Lower Courts Misunderstand This Court's Public Policy Standards for Enforcing Forum Selection Clauses under *The Bremen*.

The Court should grant review to clarify *The Bremen*. In the 26 years since the *The Bremen* decision, the Court has never declined to enforce a contractual forum selection agreement. *See* Opp. 11. Nevertheless, *The Bremen* makes clear that in cases involving domestic conduct, strong United States public policies impose meaningful limitations upon private forum selection contracts. 407 U.S. at 15-16 (citing lower court dissent). Indeed, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), an antitrust case arising from a contract between a foreign car manufacturer and a United States dealership, the Court emphasized that

> in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for

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relevant facts presented in the record" when opposing dismissal under Fed. R. Civ. P. 12(b) based on a forum selection clause. *Weidner Communications, Inc. v. Al Faisal*, 859 F.2d 1302, 1306 nn.6-7 (7th Cir. 1988); *accord New Moon Shipping Co. v. Man B & W Diesel AG*, 121 F.3d 24, 28 (2d Cir. 1997). The import of that finding and evidence is included within the Questions Presented here.

> antitrust violations, we would have little hesitation in condemning the agreement as against public policy.

Id. at 637 n.19 (1985), *quoted with approval, Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995).

The Fifth Circuit refused to follow *Mitsubishi*, erroneously ruling that the statement in *Mitsubishi* is limited to antitrust violations. Pet. 22a-23a. The Court's citation of *Mitsubishi* in *Vimar*, a case arising under the Carriage of Goods by Sea Act, makes clear that the Fifth Circuit is wrong. The Court should review that error.

II. THE COURT SHOULD REVIEW WHETHER—AS THE FIFTH CIRCUIT HELD—CLAIMS AND FACTUAL FINDINGS THAT THE DEFENDANT INTENDED CHOICE CLAUSES TO EFFECT A FRAUDULENT SCHEME ARE "IRRELEVANT" TO ENFORCEMENT.

The Court should review the Fifth Circuit's overly broad interpretation of *Scherk*, pursuant to which the Fifth Circuit improperly disregarded the *Leslie* district court's factual finding of fraud (*see* Pet. 80a-83a). The Fifth Circuit held, citing *Scherk*, 417 U.S. at 519 n.14, that "to the extent the plaintiffs claim fraud and overreaching in aspects of the General Undertaking other than the FS/COL clause, their allegations are *irrelevant* to enforceability." Pet. 13a (emphasis added). As the Petition makes clear—and Lloyd's does not dispute—that holding effectively eliminates fraud as a defense to enforcement of contractual forum selection clauses. Pet. 23-24. The Fifth Circuit's holding, furthermore, conflicts with *Moseley v. Electronic & Missile Facilities*, 374 U.S. 167 (1963), and *CBS Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette*, 912 F.2d 1563 (6th Cir. 1990).

Lloyd's contends that the Fifth Circuit's holding is consistent with *Moseley* and *CBS Employees*. Opp. 26-27 &

n.22. Lloyd's is wrong. *Moseley* required a judicial trial of fraud claims when, as in this case, the party challenging the clauses pleads that "[o]ne of the *means* used to effect [the fraudulent] scheme was . . . the insertion in the subcontracts of an arbitration clause." 374 U.S. at 171 (emphasis added).[6] Thus, claims concerning the underlying scheme to defraud *are* relevant to enforcement of an arbitration clause. Indeed, such claims are dispositive when a defendant employs the clause to effect that fraudulent scheme. The Sixth Circuit so held in *CBS Employees*, 912 F.2d at 1568 (citing *Moseley*, 374 U.S. at 171). The Court should grant certiorari in this case to resolve the circuit split concerning the interpretation and the applicability of the fraud exception under *Moseley*.

As Lloyd's correctly notes, all but three of the Petitioners asserted their fraud claims in *Richards II* rather than in this case. Opp. 2 n.2. The Court should consider this Petition together with the petition to be filed in *Richards II*.

CONCLUSION

The Petition for Writ of Cetriorari should be granted.

Respectfully submitted,

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[6] Such a fraud claim, said the Court, "goes to the arbitration clause itself." *Id.* at 171.

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-55747

D.C. No. CV-94-01211-IEG

ALAN RICHARDS, *et al.*,
Plaintiffs-Appellants,

v.

LLOYD'S OF LONDON,
an unincorporated association, *et al.*,
Defendants-Appellees.

No. 95-56467

D.C. No. CV-95-00952-IEG

JOHN R. NORTON, III; DORIS S. NORTON; DIANE B. ALLISON; CHARLES G. BENTZIN; F.M. BINKLEY; DELMAR A. BRADY; SAMME JO BRADY; GEORGE MANING CLOSE; RUSSELL M. COLLINS; PETER DWARES; ROBERT FLESVIG; DONALD G. GALLOP; CHARLES A. GERLACH, JR.; ROBERT W. GERWIG; RICHARD C. HENRY; MICHAEL C. HIRSH; R. WILLIAM JOHNSTON; JAMES H. KAYIAN; JOANNE S. KAYIAN-OLOONEY; SUZANNE KAYIAN; LOWELL CONRAD LUNDELL; JUDITH M. OTT; H.E. RAINBOLT; DAVID L. ROSENBLATT; RAY MORSE SANDERSON; CLAIRE TILLMAN; WARREN G. VANDER VOORT; PETER BECK; HAROLD FRANZ ILG; JOHN C. GRIFFIN; TED KOSLOFF; FRANCIS J. MILON; GLEN R. MOGAN; MELANIE M. NORTON; JOSEPH F. WELLER,

Plaintiffs-Appellants,

v.

LLOYD'S OF LONDON, an unincorporated association; CORPORATION OF LLOYD'S, aka Society of Lloyd's, aka The Society and Council of Lloyd's,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of California
Irma E. Gonzalez, District Judge, Presiding

Argued and Submitted
October 23, 1997—San Francisco, California
Filed February 3, 1998

OPINION

Before: Procter Hug, Jr., Chief Judge, Alfred T. Goodwin, Harry Pregerson, Alex Kozinski, Stephen S. Trott, Ferdinand F. Fernandez, Pamela Ann Rymer, Andrew J. Kleinfeld, Michael Daly Hawkins, A. Wallace Tashima, and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Goodwin; Dissent by Judge Thomas.

GOODWIN, Circuit Judge:

The primary question this case presents is whether the antiwaiver provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 void choice of law and choice of forum clauses in an international transaction. The district court found that they do not. The appeal has been argued twice. Upon reconsideration en banc, the opinion published at 107 F.3d 1422 (9th Cir. 1997) is withdrawn and we affirm the district court.

Background

Appellants, all citizens or residents of the United States, are more than 600 "Names" who entered into underwrit-

ing agreements. The Names sued four defendants: the Corporation of Lloyd's, the Society of Lloyd's, the Council of Lloyd's, (collecively, "Lloyd's") and Lloyd's of London, (the "unincorporated association").

Lloyd's is a market in which more than three hundred Underwriting Agencies compete for underwriting business. Pursuant to the Lloyd's Act of 1871-1982, Lloyd's oversees and regulates the competition for underwriting business in the Lloyd's market. The market does not accept premiums or insure risks. Rather, Underwriting Agencies, or syndicates, compete for the insurance business. Each Underwriting Agency is controlled by a Managing Agent who is responsible for the financial status of its agency. The Managing Agent must attract not only underwriting business from brokers but also the capital with which to insure the risks underwritten.

The Names provide the underwriting capital. The Names become Members of the Society of Lloyd's through a series of agreements, proof of financial means, and the deposit of an irrevocable letter of credit in favor of Lloyd's. To become a Name, one must travel to England to acknowledge the attendant risks of participating in a syndicate and sign a General Undertaking. The General Undertaking is a two page document containing choice of forum and choice of law clauses (collectively the "choice clauses"), which form the basis for this dispute. The choice clauses read:

> 2.1 The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.
>
> 2.2 Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to

> the Member's membership of, and/or underwriting of insurance business at, Lloyd's . . . .

By becoming a Member, the Names obtain the right to participate in the Lloyd's Underwriting Agencies. The Names, however, do not deal directly with Lloyd's or with the Managing Agents. Instead, the Names are represented by Members' Agents who, pursuant to agreement, stand in a fiduciary relationship with their Names. Upon becoming a Name, an individual selects the syndicates in which he wishes to participate. In making this decision, the individual must rely to a great extent on the advice of his Members' Agent. The Names generally join more than one underwriting agency in order to spread their risks across different types of insurance. When a Name undertakes an underwriting obligation, that Name is responsible only for his share of an agency's losses; however, his liability is unlimited for that share.

In this case, the risk of heavy losses has materialized and the Names now seek shelter under United States securities laws and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq. The Names claim that Lloyd's actively sought the investment of United States residents to fill an urgent need to build up capital. According to the Names, Lloyd's concealed information regarding the possible consequences of the risks undertaken and deliberately and disproportionately exposed the Names to massive liabilities for which sufficient underwriting capital or reinsurance was unavailable.

This appeal does not address the merits of the underlying claims. It addresses only the Names' contention that their disputes with Lloyd's should be litigated in the United States despite contract clauses binding the parties to proceed in England under English law. It also addresses whether default should have been entered against the unincorporated association.

Standard of Review

We review the district court's decision to enforce the choice clauses for abuse of discretion. *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 323 (9th Cir. 1996). As we are reviewing a Rule 12(b)(3) motion decision, we need not accept the pleadings as true. *Id.* at 324.

Whether the securities laws void the choice clauses is a question of law that we review de novo. *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1300 (9th Cir. 1997).

Discussion

The Names make three arguments for repudiating the choice clauses. They contend (1) that the antiwaiver provisions of the federal securities laws void such clauses, (2) that the choice clauses are invalid because they offend the strong public policy of preserving an investor's remedies under federal and state securities law and RICO and (3) that the choice clauses were obtained by fraud. We will address each of these in turn.

I

We analyze the validity of the choice clause under *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), where the Supreme Court stated that courts should enforce choice of law and choice of forum clauses in cases of "freely negotiated private international agreement[s]." *Bremen*, 407 U.S. at 12-13.[1]

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[1] While the contract in *Bremen* did not contain a choice of law clause, the Supreme Court explicitly recognized that the forum selection clause also acted as a choice of law clause. *Id.* at 13 n.15 ("[W]hile the contract here did not specifically provide that the substantive law of England should be applied, it is the general rule in English courts that the parties are assumed, absent a contrary indication, to have designated the forum with the view that it should apply its own law. . . . It is therefore reasonable to conclude that the forum clause was also an effort to obtain certainty as to the applicable substantive law.").

A

The Names dispute the application of *Bremen* to this case. They contend that *Bremen* does not apply to cases where Congress has spoken directly to the immediate issue —as they claim the antiwaiver provisions do here.

The Securities Act of 1933 (the "'33 Act") provides that:

> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

15 U.S.C. § 77n. The 1934 Securities Exchange Act (the "'34 Act") contains a substantially similar provision. 15 U.S.C. § 78cc(a). The Names seize on these provisions and claim that they void the choice clauses in their agreement with Lloyd's.

Certainly the antiwaiver provisions are worded broadly enough to reach this case. They cover "*any* condition, stipulation, or provision binding *any* person acquiring *any* security to waive compliance with *any* provision of this subchapter . . . ." Indeed, this language is broad enough to reach any offer or sale of anything that could be alleged to be a security, no matter where the transaction occurs.

Nevertheless, this attempt to distinguish *Bremen* fails. In *Bremen* itself, the Supreme Court contemplated that a forum selection clause may conflict with relevant statutes. *Bremen*, 407 U.S. at 15 ("A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by *statute* or by judicial decision.") (emphasis added).

Moreover, in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), the Supreme Court explicitly relied on

Bremen in a case involving a securities transaction.[2] Echoing the language of *Bremen*, the Court found that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Id.* at 516. *See Bremen*, 407 U.S. at 13-14 ("[A]greeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting."). This passage should leave little doubt as to the applicability of *Bremen* to the case at land.[3]

Indeed, were we to find that *Bremen* did not apply, the reach of United States securities laws would be unbounded. The Names simply prove too much when they assert that "*Bremen's* judicially-created policy analysis under federal common law is *not* controlling when Congress has expressed its will in a statute." This assertion, if true, expands the reach of federal securities law to any and all such transactions, no matter how remote from the United States. We agree with the Fifth Circuit that "we must tread cautiously before expanding the operation of U.S. securities law in the international arena." *Haynsworth v. The Corporation*, 121 F.3d 956, 966 (5th Cir. 1997).

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[2] In *Scherk* the Supreme Court assumed without so ruling that the transaction involved securities. *Scherk*, 417 U.S. at 514 n.8. Because it is not altogether clear whether the investments here were securities, we too assume without deciding that the Names invested in securities.

[3] The Names also cite *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988) in support of their position. *Stewart* does not aid the Names. It is true that *Stewart* held that before engaging in a *Bremen* analysis, "the first question [is] whether [28 U.S.C.] § 1404(a) itself controls respondent's request to give effect to the parties' contractual choice of venue." *Stewart*, 487 U.S. at 29. That case, however, involved a federal court sitting in diversity confronted with a purely domestic transaction. Thus it does not address this situation.

B

Having determined that *Bremen* governs international contracts specifying forum and applicable law, we turn to the question whether the contract between Lloyd's and the Names is international. Not surprisingly, the Names contend that these were purely domestic securities sales. They claim that Lloyd's solicited the Names in the United States and that the trip the Names made to England was a mere ritual without legal significance.

We disagree. The Names signed a contract with English entities to participate in an English insurance market and flew to England to consummate the transaction. That the Names received solicitations in the United States does not somehow erase these facts. Moreover, Lloyd's insistence that individuals travel to England to become a Name does not strike us as mere ritual. Lloyd's likely requires this precisely so that those who choose to be the Names understand that English law governs the transaction. Entering into the Lloyd's market in the manner described is plainly an international transaction.

II

We now apply *Bremen* to this case. *Bremen* emphasized that "in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside." *Bremen*, 407 U.S. at 15. The Court reasoned that "[t]he elimination of all [ ] uncertainties [regarding the forum] by agreeing in advance . . . is an indispensable element in international trade, commerce, and contracting." *Id.* at 13-14. Thus, "absent some compelling and countervailing reason [a forum selection clause] should be honored by the parties and enforced by the courts." *Id.* at 12. The party seeking to avoid the forum selection clause bears "a heavy burden of proof." *Id.* at 17.

The Supreme Court has identified three grounds for repudiating a forum selection clause: first, if the inclusion of the clause in the agreement was the product of fraud or overreaching; second, if the party wishing to repudiate the clause would effectively be deprived of his day in court were the clause enforced; and third, "if enforcement would contravene a strong public policy of the forum in which suit is brought." *Id.* at 12-13, 15, 18. The Names contend that the first and third grounds apply in this case.

A

The Names' strongest argument for escaping their agreement to litigate their claims in England is that the choice clauses contravene a strong public policy embodied in federal and state securities law and RICO. *See Bonny v. Society of Lloyd's*, 3 F.3d 156, 160-61 (7th Cir. 1993) (expressing "serious concerns" that the choice clauses offend public policy but ultimately ruling in Lloyd's favor), *cert. denied*, 510 U.S. 1113 (1994); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1364-66 (2nd Cir.) (substantially the same), *cert. denied*, 510 U.S. 945 (1993).

We follow our six sister circuits that have ruled to enforce the choice clauses. *See Haynsworth*, 121 F.3d 956; *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996); *Shell v. R. W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995); *Bonny*, 3 F.3d 156; *Roby*, 996 F.2d 1353; and *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.), *cert. denied*, 506 U.S. 1021 (1992). We do so because we apply *Scherk* and because English law provides the Names with sufficient protection.

In *Scherk*, the Supreme Court was confronted with a contract that specified that all disputes would be resolved in arbitration before the International Chamber of Commerce in Paris, France. *Scherk*, 417 U.S. at 508. The arbitrator was to apply the law of the state of Illinois. *Id.* The Court enforced the forum selection clause despite

then hostile precedent.[4] *Id.* at 520-21. *See Wilko v. Swan*, 346 U.S. 427 (153), overruled by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 485 (1989).

The Court's treatment of *Wilko* leaves little doubt that the choice clauses in this case are enforceable. In *Wilko*, the Supreme Court ruled that "the right to select the judicial forum is the kind of 'provision' that cannot be waived under § 14 of the Securities Act." *Wilko*, 346 U.S. at 435. In *Scherk*, the Court had before it a case where both the District Court and the Seventh Circuit found a forum selection clause invalid on the strength of *Wilko*. *Scherk*, 417 U.S. at 510.

In distinguishing *Wilko*, the Supreme Court stated that there were "significant and, we find, crucial differences between the agreement involved in *Wilko* and the one signed by the parties here." *Scherk*, 417 U.S. at 515. The first and primary difference that the Court relied upon was that "Alberto-Culver's contract . . . was a truly international agreement." *Id.* The Court reasoned that such a contract needs, as "an almost indispensable precondition," a "provision specifying in advance the forum in which disputes shall be litigated *and the law to be applied*." *Id.* at 516 (emphasis added).

Moreover, the Supreme Court has explained that, in the context of an international agreement, there is "no basis for a judgment that only United States laws and United States courts should determine this controversy in the face of a solemn agreement between the parties that such controversies be resolved elsewhere." *Id.* at 517 n.11. To require that " 'American standards of fairness' must . . . govern the controversy demeans the standards of justice elsewhere in the world, and unnecessarily exalts the pri-

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[4] The Court recognized that an agreement to arbitrate "is, in effect, a specialized kind of forum-selection clause." *Scherk*, 417 U.S. at 519.

macy of United States law over the laws of other countries." *Id.*

These passages from *Scherk*, we think, resolve the question whether public policy reasons allow the Names to escape their "solemn agreement" to adjudicate their claims in England under English law. *Scherk* involved a securities transaction. *Id.* at 514 n.8. The Court rejected *Wilko*'s holding that the artiwaiver provision of the '34 Act prohibited choice clauses. *Id.* at 515-16. It also recognized that enforcing the forum selection clause would, in some cases, have the same effect as choosing foreign law to apply. *Id.* at 516, 517 n.11. Yet the Court did not hesitate to enforce the forum selection clauses. It believed that to rule otherwise would "reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts.' " *Id.* at 519 (quoting *Bremen*, 407 U.S. at 9). As the Supreme Court has explained, " '[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.' " *Id.* (quoting *Bremen*, 407 U.S. at 9).

Relying on *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 634 (1985), the Names argue that federal and state securities laws are of "fundamental importance to American democratic capitalism." They claim that enforcement of the choice clauses will deprive them of important remedies provided by our securities laws. The Supreme Court disapproved of such an outcome, the Names contend, when it stated that "in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Id.* at 637 n.19.

Without question this case would be easier to decide if this footnote in *Mitsubishi* had not been inserted. Never-

theless, we do not believe dictum in a footnote regarding antitrust law outweighs the extended discussion and holding in *Scherk* on the validity of clauses specifying the forum and applicable law. The Supreme Court repeatedly recognized in *Scherk* that parties to an international securities transaction may choose law other than that of the United States, *Scherk*, 417 at 516, 517 n.11, 519 n.13, yet it never suggested that this affected the validity of a forum selection clause. *See also Bremen*, 407 U.S. at 13 n.15 (recognizing that a forum selection clause also acts to select applicable law); *Milanovich v. Costa Crociere, S.p.A.*, 954 F.2d 763, 767 n.7 (D.C. Cir. 1992) ("*The Bremen* involved a choice-of-forum clause, but the Supreme Court recognized that enforcing the provision would have the effect of subjecting the contract to foreign law.").[5]

B

Of course, were English law so deficient that the Names would be deprived of any reasonable recourse, we would have to subject the choice clauses to another level of scrutiny. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991) ("It bears emphasis that forum-selection clauses contained in form passage contracts are subject to judicial scrutiny for fundamental fairness."). In this case, however, there is no such danger. *See Haynsworth*, 121 F.3d at 969 ("English law provides a variety

[5] The Names also point to *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), as support for their position. In *Vimar*, the Supreme Court expressed concern that a forum selection clause combined with a choice of law clause would deprive a party of remedies under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. § 1300 et seq. *Id.* at 539. The Court's reasoning in *Vimar*, however, does not extend to the instant case as Vimar involved COGSA, a statute designed to address international transactions. *Id.* at 537 ("COGSA is the culmination of a multilateral effort to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers inter se in international trade.") (internal quotations and citation omitted).

of protections for fraud and misrepresentations in securities transactions."). *Cf. British Midland Airways Ltd. v. International Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974) (This court is "hardly in a position to call the Queen's Bench a kangaroo court.").

We disagree with the dramatic assertion that "[t]he available English remedies are not adequate substitutes for the firm shields and finely honed swords provided by American securities law." *Richards v. Lloyd's of London*, 107 F.3d 1422, 1430 (9th Cir. 1997). The Names have recourse against both the Member and Managing Agents for fraud, breach of fiduciary duty, or negligent misrepresentation. Indeed, English courts have already awarded substantial judgments to some of the other Names. *See Arubuthnott v. Fagan and Feltrim Underwritings Agencies Ltd.*, 3 Re LR 145 (H.L. 1994); *Deeny v. Gooda Walker Ltd.*, Queen's Bench Division (Commercial Court), The Times 7 October 1994.[6]

While it is true that the Lloyd's Act immunizes Lloyd's from many actions possible under our securities laws, Lloyd's is not immune from the consequences of actions committed in bad faith, including fraud. Lloyd's Act of 1982, Ch. 14(3)(e)(i). The Names contend that entities using the Lloyd's trade name willfully and fraudulently concealed massive long tail liabilities in order to induce them to join syndicates. If so, we have been cited to no authority that Lloyd's partial immunity would bar recovery.

C

The addition of RICO claims does not alter our conclusion. This court has already held that the loss of RICO claims does not suffice to bar dismissal for forum non conveniens. *Lockman Found. v. Evangelical Alliance Mis-*

[6] The Names complain that the Member and Managing Agents are insolvent. If so, this is truly unfortunate. It does not, however, affect our analysis of the adequacy of English law.

sion, 930 F.2d 764, 768-79 (9th Cir. 1991). We agree with our sister circuit that has considered this issue and extend the logic of *Lockman* to this case. *Roby*, 996 F.2d at 1366.

D

The Names also argue that the choice clauses were the product of fraud. They claim that at the time of signing the General Undertaking, Lloyd's knew that the Names were effectively sacrificing valid claims under U.S. law by signing the choice clauses and concealed this fact from the Names. Had the Names known this fact, they contend, they never would have agreed to the choice clauses. The Names never allege, however, that Lloyd's misled them as to the legal effect of the choice clauses. Nor do they allege that Lloyd's fraudulently inserted the clauses without their knowledge. Accordingly, we view the allegations made by the Names as going only to the contract as a whole, with no allegations as to the inclusion of the choice clauses themselves.

Absent such allegations, these claims of fraud fail. The Supreme Court has noted that simply alleging that one was duped into signing the contract is not enough. *Scherk*, 417 U.S. at 519 n.14 (The fraud exception in *Bremen* "does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud . . . the clause is unenforceable."). For a party to escape a forum selection clause on the grounds of fraud, it must show that "*the inclusion of that clause in the contract* was the product of fraud or coercion." *Id.* (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)) (emphasis in original). *See also Prima Paint*, 388 U.S. at 404 ("[T]he statutory language [of the United States Arbitration Act] does not permit the federal court to consider claims of fraud in the inducement of the contract generally.").

E

The Names object that *Moseley v. Electronic & Missile Facilities, Inc.*, 374 U.S. 167 (1963), requires the district court to adjudicate the claims of fraud before dismissal. In *Moseley*, the Supreme Court found that "it seems clear that the issue of fraud should first be adjudicated before the rights of the parties under the [contracts] can be determined." *Id.* at 171. Taken out of context, this statement would seem to support the Names' position.

When viewed in context, however, it becomes clear that this statement in fact provides no aid to the Names. The Supreme Court required an initial adjudication of the fraud claim after noting that "no request has been made here for the enforcement of the arbitration agreement included within the [contracts.]" *Id.* at 170. It was only "[w]ith the pleadings in this posture" that the Supreme Court required a trial on the fraud claims. *Id.* at 171. Here Lloyd's has clearly and vigorously called for the enforcement of the choice clauses. Accordingly, *Moseley* does not apply to the instant case and the Names are not entitled to a trial on their claims of fraud.

III

Because we decide that the district correctly ruled to enforce the choice clauses, the request to enter default against the unincorporated association is moot.

AFFIRMED.

THOMAS, Circuit Judge, with whom Judge Pregerson and Judge Hawkins join, dissenting.

The majority espouses a reasonable foreign policy, but one which emanates from the wrong branch of government. Congress has already explicitly resolved the question at hand. In the Securities Act of 1933 and the Securities Exchange Act of 1934 (the "Acts"), Congress ex-

pressly provided that investors cannot contractually agree to disregard United States securities law. Thus, in applying the "reasonableness" policy-weighing approach of *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the majority displaces Congress' specific statutory directive. Furthermore, even assuming that the *Bremen* analysis applies here, the circumstances surrounding this dispute compel the conclusion that enforcement of the choice clauses would be unreasonable. Accordingly, I respectfully dissent.

I.

Unlike the conflict the *Bremen* Court envisioned between statutes and forum selection clauses, the Acts do not merely declare "a strong public policy" against the waiver of compliance with United States securities laws. Rather, the Acts explicitly and unconditionally prohibit such a waiver. The language of the Securities Act of 1933 is clear and unambiguous.

> Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

15 U.S.C. § 77n. The Securities Exchange Act of 1934 contains a similar restriction. *See* 15 U.S.C. § 78cc(a).

Absent these antiwaiver provisions, courts could appropriately examine choice-of-forum clauses in investment contracts under a *Bremen* analysis to determine whether they violated the strong public policy of the United States as embodied in our securities law. However, the Acts' antiwaiver provisions decisively alter this inquiry. With adoption of those sections, Congress announced a per se rule that American laws cannot be ignored in this context. Courts should not employ amorphous public policy to emasculate plain statutory language. "Under our constitutional framework, federal courts do not sit as councils

of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." *United States v. Rutherford,* 442 U.S. 544, 555 (1979). Rather, "[o]nly when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied." *Id.* Because Congress quite reasonably intended that our securities laws be enforced even when a salesperson managed to obtain an investor's waiver, we "have no license to depart from the plain language" of the Acts. *Id.*

The majority turns this analysis inside out, by holding that underlying antiwaiver public policy eviscerates specific anti-waiver statutory provisions. Disregarding this express prohibition to assess whether enforcement of the choice clauses contravenes the underlying policy against waiver is akin to overlooking the plain language of a statute to consider its legislative history, a clearly disfavored method of statutory interpretation. *See Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete. . . . It would be dangerous in the extreme to infer . . . that a case for which the words of an instrument expressly provide, shall be exempted from its operation.") (citations and internal quotation marks omitted). As the majority concedes, the explicit language of the Acts bars the waiver that the choice clauses would effectuate here. Thus, the "unadorned words" of the Acts' antiwaiver provisions should not be limited by the antiwaiver public policy they impliedly express, *see Germain,* 503 U.S. at 254.

The majority's fears notwithstanding, it is unnecessary to displace Congress' reasoned judgment in order to contract the "boundless" reach of United States securities

laws. First, because plaintiffs alleging securities fraud will at some point have to establish that the disputed transactions involved "securities," as defined under United States law, plaintiffs cannot gain unfettered access to the protection of the securities laws simply by alleging that they have purchased securities. Second, the plaintiffs here do not seek to invoke the Acts' substantive remedies in the context of transactions that enjoy only an incidental nexus with the United States. Lloyd's recruited the plaintiffs, residents of the United States, in the United States, often using United States brokerage firms and recruiters, and availed itself of the United States mails to disseminate information about becoming a Name. In short, Lloyd's purposefully devoted considerable time and resources to recruiting American investors through specifically American media. To penalize the plaintiffs in this case based upon a hypothetical scenario that differs dramatically from the circumstances at issue here would work an unjust deprivation of the plaintiffs' rights under the Acts.

The majority argues that the Supreme Court's reliance on *Bremen* in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), should control here. However, the majority overlooks the crucial differences between the instant dispute and the facts underlying *Scherk*. *Scherk* involved a contract that contained an agreement to arbitrate any disputes arising out of the contract in Paris, France. This contract specified that "[t]he laws of the State of Illinois, U.S.A. shall apply to and govern this agreement, its interpretation and performance." *Scherk*, 417 U.S. at 508. In contrast, the choice clauses here not only select the forum—the courts of England—but mandate that English law shall govern any controversy. Thus, the reasoning and conclusions of *Scherk* should not extend to this case. To the extent that the Scherk Court approved a hypothetical choice-of-law clause that prescribed the application of foreign law, such approval was dicta and cannot bind the parties here.

Furthermore, the Lloyd's underwriting agreements had substantial connections with the United States, in contrast with the sparse contacts between the United States and the contract in *Scherk*. In *Scherk*, an American company made an initial contact with *Scherk*, a German citizen, in Germany, pursued negotiations with *Scherk* in both Europe and the United States, and finally executed a contract in Vienna, Austria, providing for the transfer of the ownership of *Scherk*'s enterprises. The closing of this transaction occurred in Geneva, Switzerland. In comparison, the sole component of Lloyd's campaign to recruit American Names that took place in England was the committee meeting that new Names attended in London. Otherwise, every aspect of the solicitation occurred in the United States. To characterize this extensive and multifacted recruitment campaign as the mere receipt of "solicitations," as does the majority, is to understate the impact of Lloyd's activities in the United States.

The *Scherk* majority itself recognized that a contract with "insignificant or attenuated" contacts with foreign countries might well prompt a refusal to enforce a forum selection clause, let alone a clause choosing foreign law. *Scherk*, 417 U.S. at 517 n.11. The Court observed: "Judicial response to such situations can and should await future litigation in concrete cases." *Id.* The instant case offers just such a concrete opportunity to assess the enforceability of the choice clauses independently of the *Scherk* methodology and holding—an opportunity this court should use to effectuate Congress' explicit statutory directive.

Unfortunately, the majority has chosen to contravene an unequivocal Congressional mandate, founded on an interpreation of underlying public policy. However reasonable that policy, it cannot supplant clear, unambiguous statutory language.

II

In addition to violating the Acts' express antiwaiver provisions, the choice clauses are unenforceable because

they are "unreasonable" under the circumstances." *Bremen*, 407 U.S. at 10. Initially, the Supreme Court has twice stated that the type of clauses at issue here are invalid when they prospectively disable parties from pursuing statutory remedies. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985), *quoted in Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995). Indeed, in *Vimar*, the Court went so far as to declare that "[t]he relevant question" was "whether the substantive law to be applied [would] reduce the carrier's obligations to the cargo owner below what [the Carriage of Goods by Sea Act] requires." *Vimar*, 515 U.S. at 539. In other words, the Court implicitly rejected the argument that a forum selection clause must be enforced even if some of the claims that could have been brought in the forum of the lawsuit must be forfeited.

As applied here, the logic of *Mitsubishi* and *Vimar* militates against enforcing the choice clauses. Not only do the choice clauses preclude the plaintiffs from seeking the substantive remedies the Acts offer, but the protections they provide under English law are markedly inferior to the Acts'. For instance, English law recognizes no remedy for the failure to register securities as required by section 12(1) of the Securities Act of 1933. Nor is there any English remedy against Lloyd's for negligent misrepresentation as provided by section 12(2) of the Securities Act of 1933, because the 1982 Lloyd's Act expressly immunizes Lloyd's from any claim for "negligence or other tort" unless bad faith was involved.[1] Third, no "control-

[1] While the plaintiffs may sue Members' and Managing Agents, who are not exempt from the 1982 Lloyd's Act, the Members' and Managing Agents are insolvent. The majority regards this insolvency, if true, as "truly unfortunate," but deems it irrelevant to the "analysis of the adequacy of English law." *See supra* note 6. However, it is equally reasonable to find English law all the more inadequate to address the plaintiffs' grievances, because the insolvency of one class of potential defendants so materially damages the plaintiffs' chances for recovery.

ling person" liability exists in England, whereas section 15 of the Securities Act of 1933 and section 20(a) of the 1934 Securities Exchange Act impose such liability. Thus, the choice clauses should not be enforced, because they afford a level of protection far lower than the remedies the Acts provide.

The stark differences between American and English securities laws in turn reveal additional public policy reasons for invalidating the choice clauses. Enforcing the choice clauses gravely disadvantages American businesses, because forming businesses, like Lloyd's, can recruit investors without expending the time and money involved in fulfilling the requirements of the Acts—a burden that American businesses cannot legally evade. Invalidating the choice clauses therefore eliminates any artificial advantage that Lloyd's may have enjoyed in competing in the American insurance market. In addition, the Acts furnish a necessary regulatory check upon an otherwise virtually autonomous organization. As the British government itself concedes, Lloyd's is a self-governing body charged with regulatory functions. Hence, a refusal to enforce the choice clauses would not reflect a lack of deference to English law and courts, but would simply arise from the realization that externally imposed restraints may sometimes be appropriate to control the behavior of a self-regulating organization.

The majority rejects the applicability of *Mitsubishi* and *Vimar* to the choice clauses on two bases. First, the majority assails footnote 19 in *Mitsubishi* as mere dictum which cannot outweig[h] the extended discussion and holding in *Scherk* on the validity of clauses specifying the forum and applicable law." Second, the majority objects to the extension of *Vimar* to the instant case, because *Vimar* involved the Carriage of Goods by Sea Act ("COGSA"), a statute attempting to ensure uniformity in international transactions.

This reasoning stands on tenuous ground. Initially, while footnote 19 in *Mitsubishi* was not incorporated into

the Court's actual holding, the Court left no doubt about its position on this issue by reiterating it in the entirely different setting of *Vimar*. Hence, the Court implicitly indicated that its concerns about a potential deprivation of plaintiffs' access to statutory remedies were limited to neither the antitrust nor the COGSA context. Moreover, as explained above, to the extent that the *Scherk* Court speculated about the enforceability of a contractual provision selecting foreign law, such a discussion was dictum. As such, it warrants no greater deference than footnote 19 of *Mitsubishi*.

Finally, the majority errs in characterizing the Acts as purely domestic, as opposed to the internationally-oriented COGSA. Congress intended the Securities Act of 1933 to bring the United States into line with the protections other nations gave the security-buying public, by protecting American investors against fraud and misrepresentation in the sale of securities in interstate and foreign commerce alike. In fact, Congress observed that the necessity for such legislation arose from "the fact that billions of dollars [had] been invested in practically worthless securities, both foreign and domestic, including those of foreign governments, by the American public through incomplete, careless, or false representations." The consequence, Congress concluded, was "dire national distress." S. Rep. No. 47, at 2 (1933). Not only does this legislative history establish the international, as well as domestic, perspective of the Securities Act of 1933, but it drives home the necessity for invalidating the choice clauses here. Allegations of Lloyd's "incomplete, careless, or false representations" about the plaintiffs' participation in the English insurance market are precisely the issue in this case. Most importantly, given the hundreds of millions of dollars that American Names have invested in Lloyd's underwriting agreements, the "dire national distress" that originally prompted Congress to adopt securities regulation legislation may well make an unwanted reappearance.

III.

Increasing access to international capital markets is a laudable goal, but one need not trample on United States securities laws. A company, whether foreign or domestic, surance risk is increasing, with some public offerings involving Lloyd's exposures. However, these insurance risk-backed securitized investments are marketed in conformance with securities law, with full disclosure to the investor. Indeed, the facts alleged in this case make a powerful argument for vigorous application of American securiites laws. A company, whether foreign or domestic, should not be able to mislead American investors with impunity into assuming unlimited liability for known losses with no possibility of financial gain.

When Congress voided waiver clauses, it meant what it said. The antiwaiver provisions of the Acts, whether as clear statutory directives or as embodiments of public policy, render the choice clauses unenforceable. The district court's dismissal of the plaintiffs' claims under the Acts should be reversed. Hence, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-55747

D.C. No. CV-94-01211-IEG

ALAN RICHARDS, *et al.*,
Plaintiffs-Appellants,

v.

LLOYD'S OF LONDON,
an unincorporated association, *et al.*,
Defendants-Appellees.

No. 95-56467

D.C. No. CV-95-00952-IEG

JOHN R. NORTON, III; DORIS S. NORTON; DIANE B. ALLISON; CHARLES G. BENTZIN; F.M. BINKLEY; DELMAR A. BRADY; SAMME JO BRADY; GEORGE MANING CLOSE; RUSSELL M. COLLINS; PETER DWARES; ROBERT FLESVIG; DONALD G. GALLOP; CHARLES A. GERLACH, JR.; ROBERT W. GERWIG; RICHARD C. HENRY; MICHAEL C. HIRSH; R. WILLIAM JOHNSTON; JAMES H. KAYIAN; JOANNE S. KAYIAN-OLOONEY; SUZANNE KAYIAN; LOWELL CONRAD LUNDELL; JUDITH M. OTT; H.E. RAINBOLT; DAVID L. ROSENBLATT; RAY MORSE SANDERSON; CLAIRE TILLMAN; WARREN G. VANDER VOORT; PETER BECK; HAROLD FRANZ ILG; JOHN C. GRIFFIN; TED KOSLOFF; FRANCIS J. MILON; GLEN R. MOGAN; MELANIE M. NORTON; JOSEPH F. WELLER,
Plaintiffs-Appellants,

v.

LLOYD'S OF LONDON, an unincorporated association; CORPORATION OF LLOYD'S, aka Society of Lloyd's, aka The Society and Council of Lloyd's,

Defendants-Appellees.

ORDER

BEFORE: GOODWIN, Circuit Judge.

Appellant's Motion to stay the mandate pending petition for certiorari is GRANTED.